

IN THE SUPREME COURT OF THE STATE OF NEVADA

UPPER CORRAL, INC., A NEVADA
CORPORATION,
Appellant,
vs.
DENNIS L. WILLIAMS,
Respondent.

No. 53659

FILED

NOV 18 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court summary judgment in a contract action and from a post-judgment order denying a motion for NRCP 60(b) relief.¹ Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge; Valorie Vega, Judge.

In July 2007, appellant Upper Corral, Inc., initiated this action by filing a complaint in district court seeking damages from respondent Dennis L. Williams stemming out of his breach of a commercial lease with Upper Corral. Upper Corral moved for summary judgment, which Williams opposed and countermoved for judgment on the pleadings. After a hearing, the district court entered an order granting Upper Corral summary judgment and denying the countermotion, determining, among other things, that Upper Corral should be awarded damages for missed rent for the months between when Williams stopped

¹To the extent that appellant challenges the portion of the district court's order that denied relief sought pursuant to NRCP 59, the order is not appealable. Uniroyal Goodrich Tire v. Mercer, 111 Nev. 318, 320 n.1, 890 P.2d 785, 787 n.1 (1995), superseded by statute on other grounds as stated in RTTC Communications v. Saratoga Flier, 121 Nev. 34, 110 P.3d 24 (2005).

paying rent and the new replacement tenants signed a lease of the premises. The district court also ruled, however, that Upper Corral was not to be awarded rent from Williams for the time after the replacement tenants also stopped paying rent until the original lease between Upper Corral and Williams expired. The district court made these determinations based on its conclusion that Upper Corral failed to satisfy the reasonable avoidance clause of the parties' lease regarding mitigation of damages because of the company's lack of due diligence in verifying the legitimacy of a signature of a guarantor—the mother of one of the replacement lessees—which was, in fact, forged. The district court also concluded that the forgery was not a foreseeable circumstance, as set forth in Conner v. Southern Nevada Paving, 103 Nev. 353, 741 P.2d 800 (1987), at the time that Williams and Upper Corral signed the initial lease. Upper Corral then filed a motion for relief from the judgment under NRCP 59 and 60, which Williams opposed. The district court entered an order denying the motion, and this appeal followed.

Having reviewed the parties' briefs and the record on appeal, we conclude that the district court erred in granting summary judgment because genuine issues of material fact remain regarding the mitigation of damages and foreseeability issues.² Wood v. Safeway, Inc., 121 Nev. 724,

²Williams is incorrect in asserting that this court is limited in our review to the district court order denying the post-judgment motion. Notice of entry of the district court summary judgment was served on Upper Corral by mail on February 9, 2009. Upper Corral's February 12, 2009, motion to amend the judgment under NRCP 59 thereafter tolled the period for filing an appeal. See NRAP 4(a)(4)(C). Notice of entry of the district court order denying the motion to amend the judgment was then served by mail on April 15, 2009, and Upper Corral timely filed its notice of appeal on April 20, 2009. Relatedly, we do not review Williams'

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731, 121 P.3d 1026, 1031 (2005) (stating that summary judgment is not appropriate when genuine issues of material facts exist). The reasonableness of Upper Corral's attempts at mitigation of damages and foreseeability are issues to be resolved by the trier of fact and not on summary judgment. See James Hardie Gypsum, Inc. v. Inquipco, 112 Nev. 1397, 1404-05, 929 P.2d 903, 908 (1996) (noting the trial court's role as a trier of fact regarding the reasonableness of efforts to mitigate damages), disapproved of on other grounds by Sandy Valley Assocs. v. Sky Ranch Estates, 117 Nev. 948, 35 P.3d 964 (2001); see also 86 Am. Jur. Trials 1 § 22 (2002) (explaining that "[t]he reasonableness of a landlord's mitigation efforts is a question for the trier of fact"); Grueninger Travel, Etc. v. Lake Cty. Trust, 413 N.E.2d 1034, 1039 (Ind. Ct. App. 1980) (stating that "whether the landlord exercised the requisite diligence was a question of fact to be resolved by the trier of fact"); Fort Lee v. Banque Nat. De Paris, 710 A.2d 1, 7 (N.J. Super. Ct. App. Div. 1998) (stating that "[w]hether or not the landlord's [mitigation] efforts were reasonable is a question for the trier of fact").

Regarding Upper Corral's unpaid tenant damages argument, the district court did not provide any analysis as to why it denied Upper Corral's request for these damages. As we remand this case to the district court for the reasons set forth above, we make no comment on the merits of this issue, but we direct the district court to set forth, on remand, its


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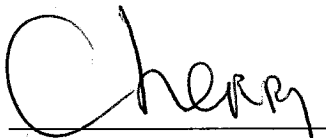
argument that the district court's damages award to Upper Corral was too high, as Williams did not file an appeal. See Ford v. Showboat Operating Co., 110 Nev. 752, 755, 877 P.2d 546, 548 (1994) (explaining that "a respondent who seeks to alter the rights of the parties under a judgment must file a notice of cross-appeal").

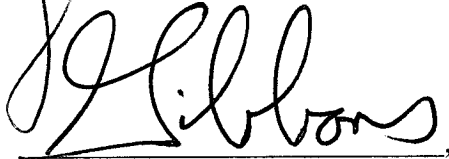
reasoning regarding why it summarily denied Upper Corral tenant improvement damages.

Accordingly, for the reasons explained above, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.³


_____, J.
Saitta


_____, J.
Cherry


_____, J.
Gibbons

cc: Hon. Linda Marie Bell, District Judge
Hon. Valorie Vega, District Judge
Carolyn Worrell, Settlement Judge
Ralph J. Rohay
Kupperlin Law
Eighth District Court Clerk

³We conclude that Williams' remaining appellate arguments, as to why the district court summary judgment should not be set aside, lack merit. Additionally, in light of this order we need not consider Upper Corral's challenge to the district court's denial of NRCP 60(b) relief. As we reverse the district court's summary judgment, however, we necessarily direct the district court to vacate its April 14, 2009, order denying NRCP 60(b) relief.