IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MINTURN TRUST; AND SATICOY BAY LLC, SERIES 4856 MINTURN AVE., A NEVADA LIMITED-LIABILITY COMPANY,
Appellants,
vs.
MARIA MORAWSKA, AN INDIVIDUAL,
Respondent.

No. 73804-COA

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court final judgment in a contract and tort action. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Appellant Minturn Trust purchased 4856 Minturn Avenue (the property) at an HOA foreclosure sale. At the time of purchase, the property was encumbered by a first deed of trust. Subsequently, Minturn Trust and Saticoy Bay LLC, Series 4856 Minturn Ave (collectively, Minturn) entered into a "Lease and Real Property Option Agreement" with respondent, Maria Morawska.[1] Thereafter, Morawska properly exercised her option under the terms of the lease option agreement. However, Minturn refused to recognize that Morawska exercised her option. At no time during the term of the lease agreement did Minturn inform Morawska that the property was

[1]Appellant Saticoy Bay, LLC Series 4856 Minturn Ave filed its notice of appeal under the name Saticoy Bay, LLC. After a review of the record, it appears that "Saticoy Bay, LLC Series 4856 Minturn Ave" is the proper name for appellant. Accordingly, the clerk of this court shall amend the caption on this court's docket consistent with the caption on this order.

encumbered, or that they did not intend to clear title to the property.[2] After Minturn's failure to convey the property under the terms of the lease option agreement, Morawska sued Minturn for breach of contract, breach of the covenant of good faith and fair dealing, conversion, fraudulent intent not to perform, and fraudulent misrepresentation. Morawska and Minturn subsequently filed competing motions for summary judgment.

The district court granted Morawska's motion for summary judgment, awarding specific performance for breach of contract and finding that Minturn breached the implied covenant of good faith and fair dealing, converted Morawska's personal and real property, and committed common law fraud. After a prove-up hearing, the district court vacated its earlier award of specific performance and entered judgment, awarding Morawska $131,482.52 in compensatory damages (including attorney fees) and $100,000 in punitive damages. On appeal, Minturn challenges the order granting summary judgment and the damages awarded in the final judgment.[3]

ANALYSIS

"This court reviews a district court's grant of summary judgment de novo . . . ." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). If a review of the pleadings and other evidence in the record demonstrate no genuine issue as to any material fact and the moving

---

[2]We do not recount the facts except as necessary for our disposition.

[3]Morawska attached several exhibits to her answering brief that were not considered by the district court below and are not contained in the record on appeal. As they are outside of the record, we do not consider these exhibits on appeal. *See Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 475, 635 P.2d 276, 277 (1981) (stating that an appellate court cannot consider matters not properly appearing in the record on appeal).

party is entitled to judgment as a matter of law, summary judgment must be granted. NRCP 56(c); *Clark v. Robison,* 113 Nev. 949, 950, 944 P.2d 788, 789 (1997).

On appeal, Minturn challenges: (1) the district court's order awarding specific performance, requiring Minturn to pay off the deed of trust in order to deliver clear title to Morawska; (2) the district court's finding that Minturn breached the implied covenant of good faith and fair dealing; (3) the district court's finding that Minturn converted monies and real property belonging to Morawska; (4) the district court's finding that Minturn committed fraud through an intentional misrepresentation or misrepresentation by omission; and (5) the damages award given by the district court in its final judgment.

We note that Minturn does not challenge the district court's finding that Morawska properly exercised her option under the agreement, or the district court's determination that Minturn breached the lease option agreement. Instead, Minturn focuses its arguments on Section 20 of the agreement, contending that the sole and exclusive remedy under the terms of the lease option agreement is a return of Morawska's $3,000 option fee. Therefore, Minturn argues, the district court's award of specific performance, compensatory damages, and punitive damages are improper.[4]

---

[4]Although the district court awarded specific performance in its order granting summary judgment, the district court later vacated this award and instead awarded Morawska alternative relief in the form of compensatory damages. As we conclude that the district court vacated its award of specific performance, we do not address this issue on appeal. *See Personhood Nev. v. Bristol,* 126 Nev. 599, 603, 245 P.3d 572, 575 (2010) ("This court will not render advisory opinions on moot or abstract questions." (internal quotation marks omitted)).

Section 20 of the lease option states that Minturn "shall convey the property at closing" to Morawska by grant, bargain and sale deed, free and clear of all liens and encumbrances. Section 20 of the agreement goes on to state, in pertinent part:

> Once title has received closing package, if [Minturn] is unable to deliver title which is free and clear of all encumbrances, then [Minturn] shall be obligated to refund Option fee in Section 17 of this Agreement upon complete surrender of the property.

Minturn contends that this language limits Morawska's remedies under the lease option agreement. We disagree.

This court interprets contract terms de novo. *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015). When interpreting a contract, "this court is not at liberty, either to disregard words used by the parties . . . or to insert words which the parties have not made use of. It cannot reject what the parties inserted, unless it is repugnant to some other part of the instrument." *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 518, 286 P.3d 249, 258 (2012) (alteration in original) (internal quotation marks omitted).

Minturn's preferred interpretation of the agreement asks this court to determine that Section 20 places a restriction on Morawska's remedies under the lease option agreement. Reading the lease option agreement as a whole, we can find no express language stating that the parties intended Section 20 to limit Morawska's remedies under the agreement, or any language showing that the parties intended Section 20 to be an exclusive remedies provision. Therefore, we conclude that Section 20 does not limit Morawska's remedies under the lease option agreement and that Morawska is free to pursue any contractual remedies available to

her at law or in equity. To conclude otherwise would be to insert language into the contract of which the parties have not made use. *Soro*, 131 Nev. at 742, 359 P.3d at 108 (explaining that courts will not "read language into the contract that is not there").

As we conclude that a return of Morawska's $3,000 option fee was not the sole and exclusive remedy under the terms of the option agreement, we now address Minturn's remaining issues on appeal.

Breach of the implied covenant of good faith and fair dealing

Minturn challenges the district court's finding that it breached the implied covenant of good faith and fair dealing. Minturn argues that: (1) the lease option agreement does not contain any affirmative representation that Minturn held clear title to the property, and (2) because Morawska had constructive notice of the encumbrance on the property she had no justified expectation of clear title. We will address each of Minturn's arguments in turn.

"[A]ll contracts impose upon the parties an implied covenant of good faith and fair dealing . . . ." *Nelson v. Heer*, 123 Nev. 217, 226, 163 P.3d 420, 427 (2007). A party breaches the covenant when it performs in a manner that is unfaithful to the contract's purpose and, thus, denies the other party's justified expectations. *Perry v. Jordan*, 111 Nev. 943, 948, 900 P.2d 335, 338 (1995). Justified expectations are "determined by the various factors and special circumstances that shape these expectations." *Id.* (quoting *Hilton Hotels Corp. v. Butch Lewis Prods. Inc.*, 107 Nev. 226, 234, 808 P.2d 919, 924 (1991)). In addition to the implied covenant of good faith and fair dealing included in every contract, Minturn and Morawska expressly recognized the covenant of good faith and fair dealing in the lease option agreement, which states: "[T]he parties hereto covenant, warrant

and represent to each other good faith, complete cooperation, due diligence, and honesty in fact in the performance of all obligations of the parties pursuant to this Lease."

The central question in determining whether the covenant was breached is whether the party acted in bad faith. *See Geysen v. Securitas Sec. Servs. USA, Inc.*, 142 A.3d 227, 237-38 (Conn. 2016) (discussing bad faith); *see also* Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 Cornell L. Rev. 810, 820-21 (1982). Examples of bad faith include "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance . . . and interference with or failure to cooperate in the other party's performance." Restatement (Second) of Contracts § 205 cmt. d (1981).

Minturn's first argument is that Morawska could not have "justified expectations" regarding Minturn delivering clear title to the property, as the lease option agreement did not contain an express provision stating Minturn had clear title to the property. Although the terms of the agreement do not specifically state that Minturn is required to obtain clear title, we conclude that Minturn, when contracting to use a grant, bargain and sale deed, created the expectation that the property would be free from encumbrances at the time of the execution of the conveyance. *See* NRS 111.170(1) (recognizing that the words "grant, bargain and sell" in a conveyance shall be construed to contain a covenant that the property is free from encumbrances); *see also Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 312-13, 301 P.3d 364, 368-69 (2013) (recognizing the established trade usage of a grant, bargain and sale deed within an option contract to mean

that the real property is "always given to the purchaser free and clear of any encumbrances or liens").

As Minturn did not submit any evidence to the district court to contradict the established trade usage of the terms "grant, bargain and sell," its use of those terms implied that Minturn would give title to the property free and clear of all encumbrances. *See Tompkins v. Buttrum Constr. Co. of Nev.*, 99 Nev. 142, 144, 659 P.2d 865, 866 (1983) (stating that words in a contract are "given their plain, ordinary and popular meaning"); *see also* Restatement Second of Contracts § 203 (1981).

Second, Minturn contends that Morawska had constructive notice of the encumbrance on the property at the time she entered into the agreement. While we conclude that Morawska had constructive notice of the defect in title, Minturn had the opportunity to clear title at any point before close of escrow, either through paying off the first deed of trust, or by a good faith effort to quiet title. Thus, Morawska's constructive notice of the encumbrance does not absolve Minturn of the duty to act in good faith.

Therefore, we conclude that Minturn breached the implied covenant of good faith and fair dealing by entering into the contract without the intention of performing, and willfully rendering imperfect performance once Morawska exercised her option. Accordingly, the district court properly determined that Morawska had a justified expectation that Minturn would make a good faith effort to clear title under the terms of the option agreement. On appeal, Minturn has failed to identify evidence in the record that shows a genuine issue of material fact to support overturning the district court's grant of summary judgment for breach of the covenant of good faith and fair dealing. *See Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 713, 57 P.3d 82, 87 (2002) ("[T]he non-moving party may not rest

upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue."). Consequently, we affirm the district court's finding that Minturn breached the implied covenant of good faith and fair dealing.

Conversion

Next, we address Minturn's arguments regarding conversion. Below, the district court granted summary judgment in favor of Morawska and found that Minturn converted $5,400 in monies Morawska paid to Minturn for the exercise of the option.[5] The district court also found that Minturn converted Morawska's real property when it locked her out of the property, "in derogation of her rights."

Minturn argues that it did not convert Morawska's option fee and additional payments toward the purchase price, as Morawska had not "made a 'complete' surrender of the property." Further, Minturn argues that it did not convert the real property by "locking her out of the property" as Morawska "never paid the agreed purchase price to become the owner of the Property," and therefore had no right to occupy the property without paying rent.

"Conversion exists where one exerts wrongful dominion over another's *personal* property or wrongful interference with the owner's dominion," including money. *Larsen v. B.R. Enters., Inc.*, 104 Nev. 252, 254, 757 P.2d 354, 356 (1988) (internal quotation marks omitted) (emphasis added). We review a district court's grant of summary judgment de novo. *Wood*, 121 Nev. at 729, 121 P.3d at 1029. We determine that Minturn

---

[5]The $5,400 figure comes from the $3,000 option fee Morawska paid to Minturn at the beginning of her lease as well as $2,400 Morawska paid towards the purchase of the property.

exerted wrongful dominion over the $5,400 when it solicited and kept the money with no intention of performing under the contract. Consequently, the district court did not err when finding that Minturn "wrongfully retained Morawska's Option Fee and additional monthly payments after the time Morawska exercised the option to purchase resulting in a derogation of Morawska's rights to those monies."

With respect to Minturn's conversion of the real property, the district court concluded, "[Minturn has] exercised wrongful dominion over the Property after the time that Morawska exercised her option to purchase by locking her out of the Property, in derogation of her rights." Under Nevada law, however, the tort of conversion applies to personal property, not real property. *See, e.g., Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 329, 130 P.3d 1280, 1287 (2006) ("Conversion is a distinct act of dominion wrongfully exerted over *personal* property . . . ." (emphasis added)); *Larsen*, 104 Nev. at 254, 757 P.2d at 356. Therefore, we reverse the district court's finding that Minturn had converted the real property at issue in this case.

Fraud

We now address Minturn's challenge to the district court's finding of fraud and award of punitive damages of $100,000 under NRS 42.005.

Punitive damages are appropriate and may be awarded "when the plaintiff proves by clear and convincing evidence that the defendant is 'guilty of oppression, fraud or malice, express or implied.'" *Bongiovi v. Sullivan*, 122 Nev. 556, 581, 138 P.3d 433, 450-51 (2006) (quoting NRS 42.005(1)). "An award of punitive damages will not be overturned if it is supported by substantial evidence . . . ." *Countrywide Home Loans, Inc. v.*

Thitchener, 124 Nev. 725, 739, 192 P.3d 243, 252 (2008). "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation marks omitted).[6]

Minturn asserts that the record does not contain any evidence of oppression, fraud, or malice. Nevertheless, the district court found that Minturn committed common law fraud by inducing Morawska to enter into the lease option agreement. In Nevada, the elements of common law fraud are: (1) a false representation made by the defendant; (2) the defendant's knowledge or belief that the representation is false; (3) the defendant's intention to induce the plaintiff to act or to refrain from acting in reliance upon the misrepresentation; (4) plaintiff's justifiable reliance upon the misrepresentation; and (5) damage to the plaintiff resulting from such reliance. *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992).

We disagree with Minturn's assertion that the record does not contain any evidence of fraud. Our review of the record shows clear and convincing evidence that Minturn knew it did not have clear title to the property before entering into the lease purchase agreement with Morawska. It also shows that Minturn did not intend to sell the property to Morawska,

---

[6]Minturn argues that punitive damages were inappropriate because Morawska's claim sounds in contract, not tort. Minturn is correct in stating that a breach of contract claim will not support an award of punitive damages. *Rd. & Highway Builders, LLC v. N. Nev. Rebar, Inc.*, 128 Nev. 384, 393, 284 P.3d 377, 383 (2012) (concluding an "award for punitive damages cannot be supported by the breach of the implied covenant of good faith and fair dealing as that claim sounds in contract, and not tort"). However, the district court concluded that Minturn's conduct was tortious and amounted to common law fraud. Thus, we conclude the district court's award of punitive damages is appropriate because it sounded in tort, not contract.

but rather intended to rent the property until the law is clarified regarding HOA foreclosures.

The record also shows clear and convincing evidence to support that: (a) neither Minturn nor its successor-in-interest ever had clear title to the property; (b) Minturn knew that it did not have clear title when it contracted with Morawska; (c) Minturn concealed that fact from Morawska; (d) Minturn impliedly represented that title was marketable; (e) Minturn had no intention of obtaining marketable title; (f) Minturn induced Morawska to enter into the lease option; and (g) Morawska relied upon those misrepresentations and entered into the contract. Therefore, we conclude that the record contains clear and convincing evidence of fraud, as Minturn acted intentionally to deceive Morawska, which deprived her of both contract and property rights. *See Bongiovi*, 122 Nev. at 581, 138 P.3d at 450-51. Accordingly, we also conclude that this finding of fraud contains substantial evidence to support the district court's award of punitive damages. *Thitchener*, 124 Nev. at 739, 192 P.3d at 252.

As the district court's finding of fraud is supported by clear and convincing evidence, we conclude that the punitive damage award is proper. Further, the award of $100,000 is within the permissible range of up to $300,000 based on the value of the compensatory damages as allowed by statute. *See* NRS 42.005(1)(b). Therefore, we affirm the district court's finding of fraud and uphold the punitive damage award on appeal.

Compensatory damages

Finally, we address Minturn's arguments regarding the remaining damages awarded. This court will affirm a damages award that is supported by substantial evidence and will reverse or reduce the amount of a compensatory damages award that is "given under the influence of

passion or prejudice," and when it shocks our conscience. *Wyeth v. Rowatt*, 126 Nev. 446, 470, 244 P.3d 765, 782 (2010) (internal quotation marks omitted). Minturn contends that each award of damages is unsupported by substantial evidence. We address each in turn.

First, Minturn challenges the award of $5,400 for "Option Fee and Add'tl Rent." As we affirm the district court's finding that Minturn converted these monies, we uphold this award.

Second, Minturn challenges the award of $11,800 for "Rent Paid after Exercise of Option." We agree with Minturn that this award of damages is improper. Morawska remained in possession of the house after exercising the option, and the district court's order required her to continue paying rent under the lease until closing if she wanted to remain in the property. Thus, Morawska was obligated to continue paying rent. To find otherwise, would entitle Morawska to receive the benefits of living in the property without providing any consideration to Minturn in return. Clearly, it would be inequitable to allow Morawska to live in the property rent-free. *See Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 381, 283 P.3d 250, 257 (2012) (explaining that accepting a benefit without payment is unjust enrichment). Therefore, we reverse the award for post-option rent in the amount of $11,800.

Third, Minturn challenges the award of $4,637.52 for "Expenses/Improvements to Property." Homeowners/lessees may be entitled to recover for improvements made to real property where there is an expectation of a future purchase. *See, e.g., Hanneman v. Downer*, 110 Nev. 167, 172-74, 871 P.2d 279, 283-84 (1984) (permitting out-of-pocket damages for improvements made to property). Thus, a trier of fact may properly award out-of-pocket damages to repair or improve the property.

Id. Here, Morawska made improvements to the property and testified regarding those improvements during the prove-up hearing. Minturn, on the other hand, did not challenge these repairs or improvements at the prove-up hearing. As out-of-pocket damages for improvements made to property are permissible, we affirm this award of damages on appeal.

Fourth, Minturn challenges the award of $17,600 for "Loss of Use (8-28-15 to 12-27-16)." We agree that this award is not supported by substantial evidence. *See Winchell v. Schiff,* 124 Nev. 938, 944, 193 P.3d 946, 950 (2008). A "party seeking damages has the burden of proving both the fact of the damages and the amount thereof." *Mort Wallin of Lake Tahoe, Inc. v. Commercial Cabinet Co.,* 105 Nev. 855, 857, 784 P.2d 954, 955 (1989). "The latter aspect of the burden need not be met with mathematical exactitude, but there must be an evidentiary basis for determining a reasonably accurate amount of damages." *Id.*

Here, Morawska failed to present evidence to support her claim for damages for loss of use in the amount of $17,600. At the prove-up hearing, Morawska based her loss of use claim on an advertisement stating that the property's rental value is "$1,100 per month." Upon review of the record, this advertisement was not admitted into evidence during the prove-up hearing. Further, Morawska failed to produce other evidence or testimony regarding her damages for loss of use of the property. Therefore, we conclude Morawska failed to support her damages for loss of use with substantial evidence. *See Mort Wallin,* 105 Nev. at 857-58, 784 P.2d at 955-56 (reversing an award of damages on appeal when appellant failed to

establish a proper evidentiary foundation for damages below). Accordingly, we reverse this award on appeal.[7]

Fifth, Minturn challenges the award of $42,000[8] for "Loss of Appreciation," as an alternative to specific performance because Minturn had failed to comply with the district court's prior order requiring Minturn to immediately quiet title in favor of Morawska. Specifically, the district court awarded Morawska appreciation damages based on the testimony of Harry Schmalz, a certified residential real estate appraiser. At the prove-up hearing, Schmalz testified that the "current fair market value" of the property was $192,000, and opined that the appreciation of the property was $42,000. Schmalz derived this amount by subtracting the purchase option price of $150,000 (the price Morawska would have had to pay for the property), from the current fair market value of $192,000, resulting in the difference of $42,000. According to Schmalz, the amount of $42,000 was the increased value of the property, which Morawska would have realized had Minturn delivered the property to her as required. Based on Schmalz's

---

[7]These damages may have been appropriate had specific performance been awarded, and there had been a delay in transferring the property warranting compensation. But this did not happen here. *See Stoltz v. Grimm*, 100 Nev. 529, 534, 689 P.2d 927, 930 (1984) ("Where a purchaser of land is awarded specific performance of the purchase contract, he or she is entitled to an allowance for the losses occasioned by the vendors delay in conveying the property.").

[8]Minturn argues that the district court erred when it awarded $30,000 to Morawska for "lost equity." Reviewing the district court's order and judgment, we conclude that the district court did not award Morawska $30,000 for lost equity; rather it awarded her $42,000.

testimony, the district court awarded Morawska $42,000 as loss of appreciation damages based on not being able to purchase the property.

We conclude that the district court did not abuse its discretion by awarding loss of appreciation damages in lieu of specific performance. As this award of damages is supported by substantial evidence, and does not shock the conscience, we affirm the award of loss of appreciation damages on appeal. *Wyeth*, 126 Nev. at 470, 244 P.3d at 782.

Finally, Minturn challenges the award of $50,045 for "Attorney's Fees as Special Damages." We review a district court's award of attorney fees for an abuse of discretion. *Liu v. Christopher Homes, LLC*, 130 Nev. 147, 151, 321 P.3d 875, 878 (2014). However, where there is a challenge to the award of fees based on the application of law, the award is reviewed de novo. *Id.* In general, attorney fees are not recoverable "absent authority under a statute, rule, or contract." *Albios v. Horizon Cmtys., Inc.* 122 Nev. 409, 417, 132 P.3d 1022, 1028 (2006). But, "[a]s an exception to the general rule, a district court may award attorney fees as special damages in limited circumstances." *Horgan v. Felton*, 123 Nev. 577, 583, 170 P.3d 982, 986 (2007).

Historically, an award of attorney fees as special damages are permitted in cases where the defendant's wrongful conduct caused the plaintiff to incur the fees in third-party litigation, such as in cases recovering real property, "clarifying, or removing a cloud upon the title to property." *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 957, 35 P.3d 964, 970 (2001), *receded from by Horgan*, 123 Nev. 577, 170 P.3d 982. In *Horgan*, the court limited *Sandy Valley* and held that attorney fees incurred in clearing title were "only allowable as special

damages in slander of title actions, not merely when a cloud on the title to real property exists." 123 Nev. at 579, 170 P.3d at 983.[9]

Here, we conclude that there is no statutory basis to award attorney fees. Further, the lease option agreement does not provide for attorney fees to the prevailing party. As this is not a slander of title action, there is no basis for an award of fees as special damages under *Horgan* and its progeny. In light of the forgoing, we reverse the award of attorney fees.

Conclusion

We conclude that the district court properly determined that a return of the $3,000 option fee is not the sole and exclusive remedy afforded to Morawska. We further affirm the district court's findings that Minturn breached the covenant of good faith and fair dealing, converted Morawska's option fee and additional funds paid towards the purchase price of the property, and committed common law fraud. In accordance with these conclusions, we affirm the district court's award of compensatory damages for the option fee and additional rent paid toward the option; damages for expenses and improvements to the property; and loss of appreciation, for a sum of $52,037.52. We also affirm the district court's award of punitive damages in the amount of $100,000, as the award is supported by substantial evidence, and within the statutory limits of NRS 42.005(b).

We reverse the district court's finding that Minturn converted real property when it locked Morawska out of the property subject to this dispute, as this is not conversion as a matter of law. We further reverse the

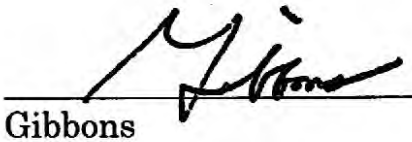
---

[9]We note that while in *Liu* the supreme court extended an award of attorney fees as special damages in those cases where a party must defend its title to real property against a third party, the facts germane to *Liu* do not apply here as Morawska was not defending title to the property, which she clearly never held. *Liu,* 130 Nev. at 156, 321 P.3d at 881.

district court's award of compensatory damages for rent paid after the exercise of the option ($11,800), for loss of use ($17,600), and attorney fees ($50,045) for the reasons discussed herein.

Based on the forgoing, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court to enter judgment consistent with this order.



_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Michael Villani, District Judge
Law Offices of Michael F. Bohn, Ltd.
Maria Morawska
Eighth District Court Clerk