MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE
COURT OF APPEALS OF INDIANA

AWP Inc.,
Appellant-Defendant,

v.

Security Self Storage LLC,
Appellee-Plaintiff.

March 8, 2022

Court of Appeals Case No. 21A-PL-1993

Appeal from the Miami Superior Court

The Honorable James K. Muehlhausen, Special Judge

Trial Court Cause No. 52D01-1709-PL-293

Tavitas, Judge.

Case Summary

[1] This appeal arises from a breach of a commercial lease ("the Lease"). AWP, Inc. ("AWP") entered into the Lease with Security Self Storage, LLC ("Security") for the use of a single-story commercial building in Peru, Indiana.

AWP vacated the property prior to the expiration of the Lease. Security re-let the property for a lesser monthly rent. Security filed suit, seeking, *inter alia*, lost rent and utilities as well as attorney's fees. The trial court ruled that AWP violated the Lease and awarded $69,078.11 in damages. AWP now appeals and argues that the trial court erred when it found that Security properly mitigated its damages and that the trial court erred in its award of attorney's fees. We affirm the trial court with respect to both of these issues. We further order the trial court to correct its order to reflect the proper amount of damages.

Issues

[2] AWP raises three issues for our review, which we consolidate and restate as:

I. Whether the trial court erred in finding that Security properly mitigated its damages.

II. Whether the trial court erroneously awarded attorney's fees to Security.

Facts

[3] Security leased a commercial property to AWP in Peru, Indiana, for $2,600 per month. AWP provides labor, signage, and equipment used to direct traffic away from road construction and sought a base of operations for the region.

[4] AWP drafted the Lease,[1] which contained this term: "Lessee shall pay for all utilities and services used or consumed upon the Premises up to an aggregate amount of $250 per month. Said utilities [ ] shall be placed in the name of the Lessee where applicable." Appellant's App. Vol. II p. 22. The parties appear to agree, however, that their shared intention was to have Lessor, Security, pay the first $250 of utilities expenses per month and that AWP, Lessee, would pay for any amount in excess of $250.[2]

[5] The Lease included the following provision for remedies in the event of a breach:

> 12. LESSOR'S REMEDIES UPON DFAULT [sic] [ ] (a) if Lessee shall at any time be in default in the payment of rent or other sums of money required to be paid by Lessee, or in the performance of any of the covenants, terms, conditions, provisions, rules and regulations of this Lease and the Lessee shall fail to remedy any such default within a period of (10) ten days, in the event the default is as to payment of rent or other sums of money, or within thirty (30) days after receipt of notice thereof from Lessor, if the default relates to matters other than the payment of rent and other sums of money (but Lessee shall not be deemed to be in default if Lessee commences to remedy said defaults, other than relate to payment of rent and other sums of money, within said thirty (30) day period and proceeds therewith with due diligence), or if Lessee shall commit waste, shall vacate the Premises, shall fail to continuously occupy and

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[1] At trial, AWP's former employee testified that AWP's attorney, licensed in the State of Tennessee, used a prior lease from Tennessee as a template for drafting the lease in the case at bar. Tr. Vol. II pp. 18-19.

[2] A former AWP employee indicated at a hearing that she believed that the error was simply that the drafting attorney had confused "lessor" with "lessee" in the relevant paragraph. Tr. Vol. II p. 34.

> conduct Lessee's business in the Premises of if Lessee shall be adjudged bankrupt or shall make an assignment for the benefit of creditor's [sic] or if a receiver of any property of Lessee in or upon the Premises be appointed in any action, court or proceeding by or against Lessee and not removed within thirty (30) days after an appointment, or if the interest of Lessee in the Premises shall be offered for sale or sold under execution or other legal process, lessor in addition to all other remedies give to Lessor in law or in equity by written notice to Lessee may terminate this Lease, or without terminating this Lease Re-enter the Premises by summary proceedings or otherwise, and in any event may dispossess the Lessee. *In the event of such re-entry, Lessor may re-let the Premises without being obligated to do so, and in the event of a re-letting may apply the rent there from* [sic] *first to the payment of Lessor's expenses, including attorney's fees uncured* [sic] *by reason of Lessee's default, and the expenses of re-letting, including but not limited to the repairs, renovation or alteration of the Premises, and then to the payment of rent, and all other sums due from Lessee.*

Id. at 23 (emphasis added).

[6] The parties signed the Lease in June 2016. In January 2017, Security notified AWP that the Lease did not reflect the intent of the parties and that AWP owed money for utilities. AWP did not remedy the lease, put the utilities in its name, or make more than one utility payment. Security notified AWP of the defect in the Lease multiple times, in writing, over the next three months.

[7] AWP acknowledged the error in the Lease but refused to correct it. AWP never put the utilities in its name, and only made one utility payment in the amount of $250. After multiple attempts to get AWP to rectify the Lease, Security indicated that AWP had thirty days to either: (1) amend the Lease and

pay the utilities owed; or (2) vacate the premises. AWP's representative indicated that it would vacate the premises within thirty days. Security responded that it "would begin marketing the property to other potential tenants." Ex. Vol. I p. 57. AWP vacated the property in May 2017.

[8] On September 5, 2017, Security filed a complaint, seeking judgment against AWP for: (1) unpaid utilities; (2) unpaid rent; (3) prejudgment interest; (4) costs; and (5) attorney's fees in the amount of $9,491.50. The trial court held a bench trial on August 11, 2021. Zac See, one of the owners of Security, testified, and the following colloquy ensued:

> Q. And [ ] when the defendant moved out of the premises did you make diligent efforts to locate a tenant who would be of similar quality?
>
> A. Yes.
>
> Q. And in connection with your attempts to do that were you successful in locating a replacement tenant?
>
> A. Yes.
>
> Q. Were there other attempts that you made to, were there other attempts to find an alternate tenant had you been in contact with another or was there another tenant that you had heard about?
>
> A. Yes.
>
> Q. And who is that individual?

A. Rich Helm.

Q. Okay and was he interested in leasing [ ] the location?

A. Yes[,] he was.

Q. And did Security Self Storage have a mortgage on the property at the time when AWP vacated?

A. Yes.

Q. Was it a substantial mortgage?

A. Yes.

Q. And did Security Self Storage substantially rely upon the rent coming in from AWP to pay that mortgage?

A. Yes.

Q. And with AWP vacating the property less than a year after the five[-]year lease was signed did that put Security Self Storage in substantially bad financial situation?

A. Yes.

Q. [ ] [S]o were there not sufficient cash reserves to be able to conduct a prolonged search for a suitable alternative tenant?

A. That's correct.

Q. [ ] [W]hen you learned that Richard Helm was interested in the property did you negotiate terms with him?

A. Yes.

Q. Okay and did you eventually end up signing a lease with Richard after AWP had already vacated?

A. Yes.

Q. Okay and under that new lease with Mr. Helm [ ]was he willing to pay the $2,600 per month?

A. No.

Q. For rent?

A. No.

Q. Okay did he end up agreeing to pay $1,900 per month?

A. Yes.

Tr. Vol. II pp. 48-50. See also testified, however, that he did not advertise the property or consider any other potential tenants. See knew of Helm's interest via word-of-mouth. When asked why he did not seek potential tenants that could pay the same as AWP had done, See responded: "Because my concern at the time was to cover the mortgage and expenses of owning that building and with the terms Mr. Helm and I discussed we could do that." *Id*. at 64.

[9] On August 27, 2021, the trial court issued its order and found that AWP had violated the Lease. The trial court ordered damages as follows:

> A. $3,000 in unpaid utility damages (13 months of $250.00 payments, less one (1) $250.00 payment made by Defendant);
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> B. $2,600 rent for June, 2017;
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> C. $2,600 rent for July, 2017;
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> D. $32,900.00 for a $700.00 per month rent deficiency for 47 months;
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> E. Prejudgment interest in the amount of $8,535.27;
>
> F. $229.92 of costs[;] and
>
> G. $9,491.50 of reasonable attorney fees.

Appellant's App. Vol. II p. 10. The total damages award, according to the trial court's order, was $69,078.11. AWP now appeals.

Analysis[3]

I. Mitigation of Damages

[10] AWP first argues that Security failed to mitigate the damages resulting from AWP's breach of contract. When a contract is breached, the non-breaching

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[3] AWP does not contest the trial court's finding that it was in breach of the Lease. *See* Appellant's Br. p. 4.

party has "a right to damages for the 'loss actually suffered as a result of the breach' once [the breaching party] breache[s] the Agreement, but not 'to be placed in a better position than [she] would have been if the contract had not been broken.'" *Fischer v. Heymann*, 12 N.E.3d 867, 871 (Ind. 2014) (quoting *Roche Diagnostics Operations, Inc. v. Marsh Supermarkets, LLC*, 987 N.E.2d 72, 89 (Ind. Ct. App. 2013) (citations omitted), *trans. denied*). The non-breaching party also has "a duty to mitigate her damages." *Id*. (citing *Hawa v. Moore*, 947 N.E.2d 421, 427 (Ind. Ct. App. 2011)). "'[T]he duty to mitigate damages is a common law duty independent of the contract terms' that requires 'a non-breaching party [to] make a reasonable effort to act in such a manner as to decrease the damages caused by the breach.'" *Id*. (quoting *Geller v. Kinney*, 980 N.E.2d 390, 399 (Ind. Ct. App. 2012); *Salem Cmty. Sch. Corp. v. Richman*, 406 N.E.2d 269, 275 (Ind. Ct. App. 1980)).

[11] "Still, 'the burden of proving that the non-breaching party has failed to use reasonable diligence to mitigate damages' lies with the party in breach . . . ." *Id*. (quoting *Hawa*, 947 N.E.2d at 427) (citing *Willis v. Westerfield*, 839 N.E.2d 1179, 1187 (Ind. 2006)). Assessing the non-breaching party's diligence with respect to damages mitigation is a question of fact, and, thus, ". . . we defer to the trial court's discretion and reverse only if there are *no* facts to support its conclusion either directly or by inference." *Id*. (citing *Berkel & Co. Contractors, Inc. v. Palm & Assocs., Inc.*, 814 N.E.2d 649, 658 (Ind. Ct. App. 2004)) (emphasis added).

[12] With such a deferential standard, we need not dwell long on AWP's arguments that Security's mitigation efforts were "lackluster." Appellant's Reply Br. at 5. Despite the fact that the Lease does not require Security to re-let in the event of a breach, the record reflects that Security found a replacement tenant almost immediately, as partly necessitated by the fact that, without a tenant, Security had only two months of operating cash. AWP contends that Security was obligated to locate a tenant that was willing to pay the same amount of rent that AWP had contracted to pay. But a non-breaching party's obligation is to exercise due diligence to *mitigate* its damages, not to *eliminate* them. AWP contends that: "Security did not advertise that the Property was available, did not make even modest inquiries around town about potential tenants, and leased the Property at a reduced rate to the first person who asked about it." *Id*. AWP does not explain, however, how any of these specifics demonstrate that Security failed to exercise the necessary reasonable diligence. The cases AWP cites merely reflect different factual scenarios, and, as we have explained, this is a fact-sensitive inquiry. There is ample evidence in the record to support the trial court's factual finding, and we decline to disturb that finding.

II. Attorney's Fees

[13] Next, AWP argues that the trial court erred in awarding attorney's fees. "'We review a trial court's award of attorney's fees for an abuse of discretion.'" *Minser v. DeKalb Cnty. Plan Comm'n*, 170 N.E.3d 1093, 1102 (Ind. Ct. App. 2021) (quoting *River Ridge Dev. Auth. v. Outfront Media, LLC*, 146 N.E.3d 906, 912 (Ind. 2020)). "'An abuse of discretion occurs when the court's decision

either clearly contravenes the logic and effect of the facts and circumstances or misinterprets the law.'" *Id*. "'To make this determination, we review any findings of fact for clear error and any legal conclusions de novo.'"[4] *Id*.

> Generally, Indiana has consistently followed the American Rule in which both parties generally pay their own fees. In the absence of statutory authority or an agreement between the parties to the contrary—or an equitable exception—a prevailing party has no right to recover attorney fees from the opposition.

Id. (quoting *BioConvergence, LLC v. Menefee*, 103 N.E.3d 1141, 1160 (Ind. Ct. App. 2018), *trans. denied*.).

[14] The party seeking fees carries a "hefty" burden to demonstrate that an exception to the American Rule is warranted. *Id*. (citing *River Ridge*, 146 N.E.3d at 911). Here, the parties contest whether the Lease itself provides authority for the recovery of attorney's fees by a party prevailing in a breach of contract action. AWP urges us to take heed of *Burk v. Heritage Food Service Equipment Inc.*, wherein we held that "attorney[']s fees are not recoverable without an *express* contractual obligation or specific statutory authority stipulating such fees are recoverable." 737 N.E.2d 803, 819 (Ind. Ct. App.

[4] We caution that AWP has mischaracterized our standard of review in its briefing. AWP includes the fact that we review legal conclusions associated with attorney's fee awards de novo and cites to *Kinsel v. Schoen*, 934 N.E.2d 133, 141 (Ind. Ct. App. 2010). AWP omits, however, that we review factual findings for clear error and that the award as a whole will only be overturned upon our finding that the trial court abused its discretion. Both of those components of the standard of review are noted in the case to which AWP directs our attention.

2000) (citing *Shumate v. Lycan*, 675 N.E.2d 749, 754 (Ind. Ct. App. 1997)) (emphasis added).

[15] Our review of more recent cases on this point suggests that the root of the question is whether the parties contracted in such a manner as to allow for the recovery of attorney's fees, not whether the terms by which they did so are express. ". . . [A] prevailing party may recover attorney fees in breach of contract actions where the parties have agreed to terms that would give rise to an award of such fees." *Sapp v. Flagstar Bank, FSB*, 12 N.E.3d 913, 928 (Ind. Ct. App. 2014) (citing *West Cent. Conservancy Dist. v. Burdett*, 920 N.E.2d 699, 702 (Ind. Ct. App. 2010). *See also Flaherty & Collins, Inc. v. BBR-Vision I, L.P.,* 990 N.E.2d 958, 966 (Ind. Ct. App. 2013).

[16] The pertinent section of the Lease reads: "Lessor. . . in the event of a re-letting may apply the rent there from [sic] first to the payment of Lessor's expenses, including attorney's fees uncured [sic] by reason of Lessee's default, and the expenses of re-letting. . . ." Appellant's App. Vol. II p. 23. What does "apply" mean in this context? AWP contends that it means that Security must take the new rent money and actually use it to begin paying down the expenses stemming from AWP's breach. We find it critical, however, that the language appears in the section of the Lease pertaining to *remedies* to which the non-breaching party is entitled.

[17] To the extent that we are interpreting this provision, we note that "[i]nterpretation and construction of contract provisions are questions of law."

B&R Oil Co., Inc. v. Stoler, 77 N.E.3d 823, 827 (Ind. Ct. App. 2017) (citing *John M. Abbott, LLC v. Lake City Bank*, 14 N.E.3d 53, 56 (Ind. Ct. App. 2014)), *trans. denied*. "If necessary, the text of a disputed provision may be understood by reference to other provisions within the four corners of the document." *See City of Portage v. S. Haven Sewer Works, Inc.*, 880 N.E.2d 706, 711 (Ind. Ct. App. 2008). We find that, in this context, "apply" refers to the calculation of damages as a remedy. The trial court applies the amount of the new rent during the calculation of damages, which includes attorney fees, and reduces the award accordingly.

[18] We are mindful of AWP's assertion that "[i]t would be a very odd attorney's fee provision indeed that only allows Security to recover its attorney's fees if it re-lets the Property." Appellant's Br. p. 11. Our role, however, is not to examine the peculiarities or eccentricities of a contract clause, but to ascertain its meaning on the basis of the text.[5] The text, and the text alone, evinces the intent of the parties absent ambiguity. To the extent that there is any ambiguity with respect to whether the parties intended to make attorney's fees recoverable, we must construe that ambiguity against the drafting party: in this case, AWP. *See, e.g., Thompson v. Wolfram*, 162 N.E.3d 498, 506 (Ind. Ct. App. 2020). Moreover, we can hypothesize that such a provision might incentivize a non-

[5] We also recall that "[t]his Court must examine the plain language of the contract, read it in context and, whenever possible, construe it so as to render every word, phrase, and term meaningful, unambiguous, and harmonious with the whole." *Celadon Trucking Servs., Inc. v. Wilmoth*, 70 N.E.3d 833, 839 (Ind. Ct. App. 2017) (citing *Tender Loving Care Mgmt., Inc. v. Sherls*, 14 N.E.3d 67, 72 (Ind. Ct. App. 2014)), *trans. denied*.

breaching party to fulfil its obligation to mitigate damages by re-letting the property.

[19] Given this reading of the Lease, we cannot say that the trial court's award of attorney's fees "clearly contravenes the logic and effect of the facts and circumstances or misinterprets the law." *Minser,* 170 N.E.3d at 1102. Accordingly, the trial court did not err in awarding attorney's fees to Security.

III. Order to the Trial Court

[20] Finally, we note that the parties agree that the trial court's order appears to contain a scrivener's error with respect to the calculation for the correct amount of damages. The order indicates that Security is entitled to $59,356.69 (which already includes attorney's fees and costs) "*plus* $9,491.50 attorney fees and $229.92 costs." Appellant's App. Vol. II p. 11. Thus, the order double counts the attorney's fees of $9,491.50 and the costs of $229.92. AWP failed to file a motion to correct error below. Both parties urge us to remand: AWP so that damages might be recalculated (though they have already been correctly calculated), and Security so that it might be heard on obtaining *additional* attorney's fees deriving from this appeal. A remand, however, implies that we are returning jurisdiction to the trial court, rather than ending this litigation. We decline the invitation.

[21] Rather, we direct the parties to Indiana Appellate Rule 66, which details relief available on appeal. Rule 66(C)(7) provides that "[t]he Court may . . . order correction of a judgment or order." Accordingly, we order the trial court to

correct its order, remove the scrivener's error, and award the correct amount of damages. The trial court's order should read: "Accordingly, the Court now enters Judgment on Count I, of Plaintiff's Complaint, in favor of the Plaintiff, Security Self Storage, LLC, and against the Defendant, AWP, Inc., for breach of contract in the amount of $59,356.69."

Conclusion

[22] The trial court did not err in finding that Security exercised reasonable diligence in mitigating the damages resulting from AWP's breach and did not err in awarding attorney's fees to Security. We affirm. We further order the trial court to correct its order to reflect the proper amount of damages.

[23] Affirmed.

Bradford, C.J., and Crone, J., concur.