

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2007-419

MAY TERM, 2008

Judy Foregger, Trustee for the Russell F. Foregger Trust	}	APPEALED FROM:
	}	
	}	
v.	}	Lamoille Superior Court
	}	
Elizabeth Gadbois d/b/a The Body Lounge	}	DOCKET NO. 42-2-07 Lecv

Trial Judge: Brian J. Gearson

In the above-entitled cause, the Clerk will enter:

Tenant Elizabeth Gadbois appeals from a superior court judgment in favor of landlord Judy Foregger, as trustee for the Russell F. Foregger Trust, in a dispute involving a commercial lease. Tenant contends that the parties intended the security-deposit provision of the lease to serve as a liquidated damages clause and landlord’s exclusive remedy in the event of a breach, and that the court’s award of actual damages was therefore in error. We affirm.

The undisputed material facts may be summarized as follows. In June 2005, the parties entered into a two-year commercial lease for a property in the Town of Stowe in which tenant planned to operate a business known as “The Body Lounge.” The monthly rent was \$950, and tenant provided a security deposit of \$1900. Tenant occupied the premises until October 1, 2006, when she informed landlord in writing of her intent to immediately move the business to another location and consequently ceased paying rent. Landlord was able to re-let the property commencing on February 1, 2007, at a slightly higher rent of \$1000 per month, and shortly thereafter filed a complaint against tenant for breach of the lease agreement. Landlord sought damages for the balance of the unpaid rent and expenses due under the lease, which totaled in excess of \$6,000. Landlord also sought reasonable attorney’s fees under a lease provision authorizing such an award. Tenant answered, asserting as an affirmative defense that landlord’s exclusive remedy was “a liquidated damages scheme in the lease.”

Landlord moved for summary judgment, which defendant opposed, asserting that the parties intended the security deposit provision of the lease to serve as a liquidated damages clause and landlord’s sole remedy. In October 2007, the trial court issued a brief entry order granting judgment in favor of landlord in the amount of \$5651.80, which represented the unpaid

rent for the balance of the lease term plus expenses and attorney's fees, less the security deposit of \$1800 (\$100 was deducted from the security deposit for cleaning expenses). Although the court did not directly address the liquidated damages issue, it impliedly ruled against tenant, observing that the lease authorized the security deposit to be applied against tenant's outstanding obligations in the event of a default. This appeal followed.\*

In reviewing a summary judgment, we apply the same standard as the trial court, affirming such a judgment when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Murdoch v. Town of Shelburne, 2007 VT 93, ¶ 5. Our review of the trial court's interpretation of a contract is de novo and nondeferential. Dep't. of Corr. v. Matrix Health Sys., 2008 VT 32, ¶ 11. Our goal is to effectuate the intent of the parties as expressed in the plain language of the contract. Id. ¶ 12. Assessed in light of these standards, the court's ruling here must be affirmed.

Under a section addressed to "security," the standard form lease at issue here provides that the landlord may apply all or a portion of the security deposit "on account of tenant's obligations" and that, in the event tenant defaults on the agreement, landlord "may retain the security deposit as additional refund." The deposit was "not to be applied towards any month's rental payment." Tenant maintains that these provisions effectively create a liquidated damages clause exclusive of other civil remedies, alleging that the lease contains no other provision addressed to landlord's rights in the event of a default, and no specific provision authorizing landlord to "waive" the security deposit provision and pursue its legal remedies.

The argument is unpersuasive. First, contrary to tenant's claim, the lease is devoid of any language stating or implying that retention of the security deposit is intended to serve as landlord's sole remedy in the event of a breach. Indeed, nothing in the security-deposit section of the lease makes reference to any other remedies as barred or unavailable to landlord. See Murphy v. Stowe Club Highlands, 171 Vt. 144, 153 (2000) (rejecting claim that contract provision for retention of escrow amount in the event of a default created exclusive liquidated damages clause where it neither "state[d] or suggest[ed] that the delivery of the escrow amount is the exclusive remedy for defendants' breach" nor mentioned other remedies in connection with the escrow). Second, tenant is incorrect in asserting that the lease contains no other provision addressed to landlord's rights in the event of a default. Under a section entitled "Default" the lease provides: "Recovery of premises by owner shall not relieve tenant of any obligation hereunder, and owner may let the premises to others upon such terms and conditions as he deems proper, and recover from tenant sums due hereunder less any consideration received from others for the use of the premises, for the remaining term hereof, after paying expenses." Thus, the lease plainly contemplates the precise course of action undertaken by landlord here, in which it sought to mitigate damages by re-letting the premises and then brought an action for the balance of the rent remaining.

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\* Although tenant raised issues below regarding the reasonableness of the \$50 increase in rent and the award of attorney's fees, they have not been raised or briefed on appeal. Accordingly, the issues are waived. See Rowe v. Brown, 157 Vt. 373, 379 (1991) (issues not raised on appeal are deemed waived).

There is no merit to tenant's claim that the lease contains an exclusive liquidated damages clause which barred landlord's civil action for the damages incurred. Accordingly, we discern no basis to disturb the judgment. Our conclusion renders it unnecessary to consider whether, as tenant claims, the purported liquidated damages clause was reasonable under the criteria set forth in Renaudette v. Barrett Trucking Co., Inc., 167 Vt. 634, 635 (1998) (mem.).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Brian L. Burgess, Associate Justice