IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
September 15, 2003 Session

THE HARDISON LAW FIRM, P.C. v. CALVIN HOWELL

A Direct Appeal from the Chancery Court for Shelby County
No. 98-1037-I The Honorable Walter L. Evans, Chancellor

No. W2002-01945-COA-R3-CV - Filed November 17, 2003

This appeal arises from the breach of a commercial lease. Appellant/Landlord breached lease by failing to provide around the clock security guard as required by the lease. After notice and time to cure, Appellee/Tenant vacated lease and moved its offices to a new building. Appellee/Tenant sued Appellant/Landlord for breach to recover moving expenses, relocation costs, increased rents, and attorneys fees. Appellee/Tenant was granted partial summary judgment on the issue of Appellant/Landlord's breach of the lease. After a separate hearing on damages, Appellee/Tenant was awarded judgment against Appellant/Landlord. Appellant/Landlord appeals both the grant of partial summary judgment and the award of damages. We affirm as modified herein.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed as Modified

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J.and HOLLY M. KIRBY, J. AND joined.

Nicholas E. Bragorgos, Thomas F. Preston of Nashville For Appellant, Cross Appellee, Calvin Howell

J. Houston Gordon, Covington, For Appellee, Cross Appellant, The Hardison Law Firm

OPINION

On July 31, 1997, Calvin Howell ("Howell," "Appellant," "Landlord," or "Defendant") and the Hardison Law Firm ("Hardison," "Appellee," "Tenant," or "Plaintiff") entered into a written lease contract (the "Lease") wherein Howell agreed to lease property at 67 Madison Avenue, Memphis, Tennessee (the "Property") to Hardison. The Lease reads, in relevant part, as follows:

3. Term. The term of this lease (the "Term") shall be six (6) years, commencing on November 1, 1997, (the "Commencement Date") and ending on October 31, 2003...

* * *

...Subject to Tenant's prior written approval, Landlord hereby agrees to provide Tenant with four (4) reserved and four (4) non-reserved parking spaces in the Brinkley Plaza parking garage at no additional cost to Tenant...

5. Right of First Refusal: Tenant will retain the right to lease any of the space adjacent to the Leased Premises, up to an additional 2,000 square feet, in the event that any third party makes an offer to Landlord to lease any of the space so described and shown. In the event that Landlord receives any offer to lease any or all of said space, Landlord will make known to Tenant that offer. Tenant will have ten (10) calendar days from receipt of that notice to communicate to Landlord that it wishes [to] lease that premises. Landlord agrees to lease said space to Tenant at the same rate per square foot as Tenant is paying Landlord at that time, and further agrees to construct and finish such space in a manner comparable to the original Leased Premises at Landlord's sole cost and expense.

11. Services by Landlord:

(a) So long as Tenant is not in default under the Lease, Landlord agrees to make available for the occupied portion of the Leased Premises the following services:

* * *

(v) Freight elevator service and receiving stations in common with other tenants available 7:00 a.m. to 6:00 p.m., Monday through Friday, and from 7:00 a.m. to 12:00 noon on Saturday, except on legal holidays;

* * *

(viii) Building security for public areas, including, but not limited to, totally automated fire and alarm systems, twenty-four hours per day, seven days per week, and at least one security guard on the premises twenty-four hours per day, seven days per week.

The relevant default provisions of the Lease are as follows:

> 19. Default by Landlord:
>
> (a) The following events shall be deemed to be Events of Default by Landlord under this Lease:
>
> * * *
>
> (ii) Landlord's failure to comply with any term, provision, or covenant of this Lease (other than the payment amounts due hereunder), and Landlord's failure to cure the same within thirty (30) days after written notice thereof to Landlord or, with respect to failures to comply with a term, provision, or covenant of this Lease which cannot reasonably be cured within thirty (30) days, such longer period of time as may be reasonably necessary to cure the same provided that Landlord commences to cure the same within such thirty (30) day period and thereafter diligently prosecutes the curing thereof.
>
> * * *
>
> (b) If any Landlord's Event of Default shall have occurred, Tenant shall have the right, at its election, then or at any time thereafter, while such Landlord's Event of Default shall continue, to pursue any one or more of the following remedies:
>
> (i) Terminate this Lease by giving thirty (30) days written notice thereof to Landlord and thereafter all obligations set forth herein shall terminate as of that date Tenant vacates the Leased Premises. Nothing contained in this Lease shall limit or prejudice the right of Tenant to prove and obtain any appropriate legal proceedings, an amount equal to the maximum allowed by any statute or rule of law in effect at the time when, and governing the proceedings in which, the damages are to be proved;

In addition, under paragraph 34 of the Lease, Landlord agreed to maintain the building as a "Class A" building, to wit:

> 34. Building Quality. Landlord hereby agrees to control the pedestrian access to the common areas of the building and to generally maintain all common areas, including, but not limited to, the first floor common areas in such a condition so as to achieve and

> maintain a "Class A" building standard and appearance, as generally set out in attached Exhibit "C". Should Landlord fail to achieve and maintain such "Class A" building standard and appearance, and such failure continues for a period of thirty (30) days after Tenant has delivered to Landlord a list specifically identifying those items requiring attention in order to achieve and maintain such "Class A" building standard and appearance, then in such event, Tenant shall have the right, in its discretion, to terminate this Lease.

Exhibit "C" to the Lease defines a "Class A" building as follows:

> A Class "A" Building is one of the most prestigious buildings in a given market, competing for premier office tenants. Said buildings have high quality standard finishes, state of the art systems, lobbies and common areas, exceptional accessibility and a definite market presence.[1]

On October 31, 1997, the Lease was amended by increasing the rental area by 915 square feet, bringing the total rentable area to 9,779 square feet. In all other respects, the Lease remained unchanged and in full force and effect.

On or about December 27, 1997, while no security guard was on duty, the Hardison office space was burglarized. Several computers, and dictation equipment were stolen. On February 8, 1998, a fire broke out in the freight elevator on the east side of the Property. At the time of the fire, the building was closed and no security guard was present in the building. The rear door leading to the Hardison office space was damaged by the Fire Department during this event. On February 9, 1998, Jerry O. Potter, Vice President of Hardison, sent a letter to Howell. The February 9 letter reads, in relevant part, as follows:

> Dear Mr. Howell:
>
> Please be advised that The Hardison Law Firm, P.C. pursuant to the Office Lease Agreement dated July 31, 1997 is declaring that you are in default under the terms of said lease. Specifically, you have failed to do the following: (1) To provide construction finishes as follows: Shower in restroom of Partner 1; Parquet floor in office of Partner 2; Shower in restroom of Partner 4; Parquet floor in office of Associate 2; Complete the Law Library; Complete the Kitchen/Breakroom; balance HVAC system so all room[s] are evenly supplied; replace broken or stained ceiling tiles. (2) Pursuant to the

[1] Exhibit A to the Lease is a floor plan of the rented space. Exhibit B to the Lease is a three page "Plans and Specifications" for the construction and finishes to be done on Hardison's office space by Howell.

> terms of said Lease Agreement you are to provide (4) reserved parking spaces and four (4) non-reserved parking spaces at the Brinkley Plaza Parking Garage. (3) Building security for public areas, including, but not limited to totally automated fire alarm systems, 24 hours per day, 7 days per week and pursuant to Paragraph 11(a)(viii) building security for public areas is to be provided on a 24-hour basis 7 days per week and at least one security guard on the premises 24 hours per day, 7 days per week...
>
> To our knowledge no security guard has been on the premises with the exception of the one that The Hardison Law Firm hired during the move-in. To date we have been broken into on one occasion with a loss of several thousand dollars worth of computer equipment and dictating equipment. On February 8, 1998, a fire occurred in the freight elevator. The rear door leading to the leased premises was damaged by the fire Department during this event. This event has clearly indicated to The Hardison Law Firm that this building is not secure or safe since no security guard was on duty during the occurrence of this fire and no alarm system was activated...
>
> Please be advised that unless all of the above items are rectified within thirty (30) days it is the intent of The Hardison Law Firm to declare this lease terminated...

The Hardison office space was again burglarized at some point during the night of July 2, 1998. Mr. Potter discovered the burglary upon entering his office on the morning of July 3, 1998. The cabinets in his credenza had been rifled and two 35mm cameras stolen. Several other items were stolen during this burglary and a fireproof safe, which contained highly sensitive and confidential documents, had been rifled. At the time that this burglary occurred, there was not a security guard present. On July 6, 1998, David M. Cook, Hardison's president, sent a letter by certified mail to HPI, Inc., the corporation controlled by Calvin Howell. The July 6, 1998 letter reads, in pertinent part, as follows:

> ...The following must be accomplished, either by your doing so voluntarily, or by us taking the necessary steps and deducting the expense from the rent:
>
> 1. All locks in the building must immediately be changed, per the suggestion of the reporting police officer.
>
> * * *

> 3. A bonded 24 hour security guard must be present in the building seven days a week, stationed in the lobby but periodically making rounds.
>
> * * *
>
> You have until the close of business on Thursday, July 9, 1998, to reply to this communication **in writing**; if we have not heard from you, **in writing**, we will make the necessary arrangements and deduct the expenses from the rent. The rent is being withheld until we have had a **written** response to this letter.

Pursuant to this letter, Hardison did hire its own security. On July 17, 1998, Mr. Potter sent another letter to Howell on behalf of Hardison. The July 17 letter informed Howell that Hardison was continuing to provide its own security, during regular business hours, for the leased premises and reiterated the demand that Howell provide at least one security guard on the premises 24 hours per day, 7 days per week.

Hardison filed a Complaint for Breach of Contract and for Declaratory Judgment (the "Complaint") against Calvin Howell on November 12, 1998. The Complaint reads, in pertinent part, as follows:

> 6. The Plaintiff alleges that Defendant has breached and is in default of the "Lease" in the following ways:
>
> A. The Defendant has refused to provide "Building security" including, but not limited to, totally automated fire and alarm systems and at least one security guard on the premises twenty-four hours per day, seven days per week;
>
> * * *
>
> 13. Because of the refusal of the Defendant to provide the security as required by the "Lease," and, further, because of the two burglaries and the loss of several thousands of dollars in equipment and personalty, it was abundantly clear that the building was not secure or safe, Plaintiff hired its own security personnel to protect its property and to mitigate its damages resulting from Defendant's continuing breaches of the "Lease."
>
> * * *

> 15. The Defendant refused and continues to refuse to provide security for the building as required under the "Lease."
>
> * * *
>
> WHEREFORE, the Plaintiff requests the following relief:
>
> 1. That the Defendant be found to be in breach of contract and in default under the terms of the "Lease;"
>
> 2. That the "Lease" be terminated and that the Plaintiff be relieved from any and all further liability or obligation under said "Lease;"
>
> 3. That the Plaintiff be awarded a judgment for all damages and expenses that it has suffered and/or incurred as a result of the breaches by the Defendant of the terms of the "Lease," including, but not limited to, the losses resulting from Defendant's breaches and default and the costs incurred by Plaintiff to provide security guards to protect the leased premises and its properties located therein;
>
> 4. That the Plaintiff be awarded a judgment for all expenses and costs associated with its move to other premises, including, but not limited to, all moving costs and the costs of moving all telephone and computer systems...

Over the weekend of June 12-13, 1999, Hardison's offices were again burglarized. One of the rear doors to the leased premises was forced open and two notebook computers and one cellular telephone were stolen. Following this break-in, Mr. Potter, on behalf of Hardison, faxed a letter to Howell's attorney. The letter, dated June 14, 1999, reads, in relevant part, as follows:

> We [Hardison] are demanding that all doors to The Hardison Law Firm space be repaired and secured by 5:00 p.m. today (June 14, 1999).
>
> I am demanding that I receive confirmation by 12:00 noon today (June 14, 1999) that steps will be taken to have all doors repaired and secured by 5:00 p.m. today. Failure to receive this notice by noon will result in The Hardison Law Firm securing workers to repair these doors. All charges will be added to the damages which are accruing against your client because of his intentional and continuing breach of the lease agreement.

> Furthermore, please be on notice that as of today, The Hardison Law Firm will have 24-hour security on the weekends in order to protect its property and personnel. These charges will be added to the growing list of damages in the Chancery Court lawsuit.

On January 22, 1999, Howell filed "Defendant's Answer to Complaint for Breach of Contract and for Declaratory Judgment" (the "Answer"). Howell stated in his Answer that "[t]he Defendant admits that there has not been a security guard on the premises 24 hours per day 7 days per week." The Answer raises the following affirmative defenses: (1) "...that Plaintiff has violated the lease, and has failed to pay rent as required under the lease," and (2) "...that Plaintiff wrongfully used space in the building which they did not have a lease for, and for which they did not pay rent." On January 22, 1999, Howell also filed "Defendant's Answers to Plaintiff's Request for Admissions," which reads, in pertinent part, as follows:

> 11. Please admit that pursuant to the Office Lease (Exhibit 1 to the Complaint) the defendant pursuant to Paragraph 11 of said Agreement agreed to provide at least one security guard on the premises 24 hours per day, 7 days per week.
>
> **Response**: Admitted.
>
> 12. Admit that defendant failed to provide at least one security guard on the premises 24 hours per day, 7 days per week.
>
> **Response**: Admitted.

Because of Howell's continued failure to provide security for the Property, pursuant to the Lease, Hardison moved its offices on August 27, 1999. On October 5, 1999, Howell filed a Counter-Claim, which alleged that Hardison "has vacated the premises thereby breaching the lease in its entirety, and [Hardison] is now liable for all rental proceeds that [Howell] would have collected through the duration of the lease." On October 12, 1999, Hardison moved for summary judgment and filed a "Separate Statement of Material Facts in Support of Plaintiff's Motion for Summary Judgment," "Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment," and the Affidavit of Jerry O. Potter.

On October 14, 1999, Hardison filed "Counter-Defendant's Answer and Motion to Dismiss Counter Claim," in which Hardison asserted the affirmative defenses of "'first breach,' estoppel, unclean hands, deceptive trade practices, fraud and misrepresentation."

On or about February 9, 2000, Howell filed his response to Hardison's Motion for Summary Judgment (the "Response"). Attached to the Response as "Exhibit A" was the Affidavit of. Howell, in which he admitted he had not provided security guards 24 hours per day, 7 days per week.

However, Howell stated that, in the Spring of 1998, he agreed to allow Hardison to occupy an additional 1,200 square feet of space in the Property without paying for it in return for his not supplying the required security guard 24 hours per day, 7 days a week. On February 10, 2000, Hardison filed its Reply to Howell's Response. Although Hardison does not deny the allegation that they were occupying 1,200 additional square feet of the Property without paying additional rents, the Hardison Reply does make the following, relevant, statements, concerning any oral agreement for a waiver of security required under the Lease:

> As set forth in Defendant Calvin Howell's Response to Plaintiff's Motion for Summary Judgment...Defendant admits all of the "undisputed facts" as set forth by the Plaintiff are true and correct but attempts to assert a theory of "estoppel." As shown hereinafter, the undisputed facts contradict the position that Howell takes of estoppel, based upon occurrences in the Spring of 1998, when, according to Howell, the Defendant and the Plaintiff had discussions concerning Plaintiff's not paying for additional space in return for the Defendant not supplying a 24-hours per day, seven days per week security guard.
>
> II.
>
> According to Defendant Howell's affidavit...these discussions took place some time in the Spring of 1998. As admitted in the Defendant's Response, however, after the Spring of 1998, he was placed on notice, once on July 6, 1998 and again on July 17, 1998, that he was in default because of his failure to provide at least one security guard on the premises 24-hours per day, seven days per week. Demand was made for him to provide the same and, then for a third time, on June 12-13, 1999, the Defendant admits that he received, yet, another letter in which the Plaintiff again alleged Howell's default as a result of the failure to provide a 24-hour per day security guard.
>
> III.
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> Thus, assuming arguendo that there was some oral discussion in the Spring of 1998, by July 16, 1998, it was clear, as shown by the admitted correspondence to the Defendant, there was no such "agreement." Thus, there can be no estoppel.

On March 13, 2000, Hardison's Motion for Summary Judgment and Hardison's Motion to Dismiss Howell's Counter-Claim were heard by the Chancery Court of Shelby County. On

March 29, 2000, the trial court entered its "Order Granting Plaintiff The Hardison Law Firm, P.C. Partial Summary Judgment" (the "Order"). The Order reads, in relevant part, as follows:

> It appearing to the Court, after review of the separate statement of material facts in support of Plaintiff's motion for summary judgment and the Defendant's reply to Plaintiff's statement of undisputed facts, the affidavits, memoranda, and arguments of counsel in this cause, that the Defendant has admitted or does not deny the following undisputed facts:
>
> 1. On July 31, 1997, the Plaintiff and Defendant entered into a written lease contract (hereinafter "Lease") wherein the Defendant agreed to lease office space to the Plaintiff on the second floor of the office building (hereinafter "Building") located at 67 Madison Avenue, Memphis, Tennessee 38013.
>
> 2. The Lease provided that the Defendant agreed to provide the Plaintiff "[b]uilding security for public areas, including, but not limited to...at least one security guard on the premises twenty-four hours per day, seven days per week."
>
> With respect to ¶ 2 of the Plaintiff's statement of facts, Defendant was obligated under the ¶11(a) of the lease to "make available" various services, including, at subparagraph (viii), Building security for public areas, including, but not limited to, totally automated fire and alarm systems, 24 hours per day, seven days per week, and at least one security guard on the premises, twenty-four hours per day, seven days per week.
>
> 3. The Defendant failed to provide at least one security guard on the Building premises 24 hours per day, 7 days per week.
>
> 4. On or about December 24, 1997, while no security guard was on duty in the Building, the back door to the Plaintiff's leased space was broken into and the leased premises were burglarized. Several computers, dictating equipment and other items were stolen.
>
> 5. On February 8, 1998, a fire occurred in the freight elevator on the east side of the Building. At the time of the fire, the Building was closed and no security guard was present in the building. The Fire Department damaged the rear door leading to the premises leased by Plaintiff during this event.

6. On February 9, 1998, Jerry O. Potter, on behalf of the Plaintiff, sent a letter to the Defendant advising him that the Defendant was in default under the terms of the lease entered into on July 31, 1997. As reflected in Jerry O. Potter's letter of February 9, 1998, one of the elements of default which he pointed out to the Defendant was the Defendant's failure to provide at least one security guard on the premises 24 hours per day, 7 days per week.

7. The office the Plaintiff leased in the Building was again burglarized at some point during the night of July 2, 1998 through July 3, 1998. Jerry O. Potter personally discovered the burglary when he entered his office in the Building on the morning of July 3, 1998, and he found that cabinets in his credenza had been rifled and two (2) 35mm cameras stolen. He did a survey of the office and discovered that several other items had been stolen, as well as a fireproof safe which contained very highly sensitive and extremely confidential documents had been rifled. At the time that the above mentioned burglary occurred, there was not a security guard present in the building 24 hours per day, 7 days per week.

8. On July 6, 1998, David M. Cook, the President of the Hardison Law Firm, P.C., sent a letter by certified mail to HPI, Inc., the corporation controlled by the Defendant. In his letter, Mr. Cook requested that "A bonded 24 hour security guard must be present in the building seven days a week, stationed in the lobby but periodically making rounds."

9. Furthermore, due to the failure of Calvin Howell to provide security guards 24 hours per day, 7 days per week, the Plaintiff hired individuals to provide security for its leased space.

10. On July 17, 1998, Jerry O. Potter, on behalf of the Plaintiff, sent a letter to the Defendant in which Mr. Potter again demanded that defendant Howell provide at least one security guard on the premises 24 hours per day, 7 days per week and further informed Mr. Howell that the Plaintiff was continuing to provide its own security for its leased premises.

11. Over the weekend of June 12-13, 1999, the Plaintiff's offices were again broken into. One of the rear doors to the leased premises was forced open and two notebook computers and one cellular telephone were stolen.

12. The day after the June 12-13, 1999 break-in occurred, Jerry O. Potter faxed a letter on behalf of the Plaintiff, to Nick Bragorgos, the attorney for the Defendant, informing him of the recent break-in, as well as again giving notice that the Plaintiff was employing 24 hour security over the weekends.

13. At no time while the Plaintiff was a tenant at the Building did the Defendant provide at least one security guard 24 hours a day, 7 days a week.

14. The Lease provides that the Defendant's failure to comply with any part of the Lease, and Defendant's failure to cure the same within thirty (30) days after written notice to the Defendant, is an event of default on the part of the Defendant.

15. The Lease provides that upon the Defendant's Lease default, the Plaintiff has the right to both terminate the Lease by giving thirty (30) days notice to the Defendant as well as to bring a damage action seeking the maximum damages allowable by law.

The Court further finds that the Defendant's argument that an estoppel was created by a conversation in which the Defendant alleges that he agreed, in the Spring of 1998, to allow the Plaintiff to occupy additional space in return for not supplying the required security guard, can not be a separate enforceable agreement but would be an oral modification of the terms of the lease, such oral modification being specifically prohibited by paragraph 29, found at page 13 of the lease, which provides:

This lease shall not be amended, changed, or extended except by written instrument signed by both parties hereto.

By the express terms of the lease, therefore, the Defendant's reliance upon an alleged oral modification of the lease must fail as a matter of law. Moreover, the Court notes that after the alleged oral modification, the Defendant admits that he was repeatedly placed on notice on July 6, 1998 and again on July 17, 1998 that he was in default for the specific reason of failing to provide a security guard on the premises, 24 hours per day, 7 days per week, and, further, that demand was again made for him to provide the same on June 12-13, 1999, all of which notices of default the Defendant admits he received.

> The Court finds that based, upon the above undisputed facts in this case and the admissions of the Defendant, the Defendant breached an essential part of the contract and, as a result, The Hardison Law Firm, P.C., was entitled to act as it did in terminating the lease and vacating the premises. Therefore, it follows that the Defendant's counter-claim for damages as a result of the vacation of the premises and failure to pay rent has no basis in law or fact and should, therefore, be dismissed.
>
> The Court notes, however, in so ruling, that this ruling does not prohibit, at this stage, the Defendant from alleging an equitable set-off against any damages that may be assessed against him by the Plaintiff's failure to mitigate and/or the Plaintiff's alleged wrongful use of unleased space.
>
> IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff, The Hardison Law Firm, P.C., is hereby granted partial judgment as to the issue of liability in this cause and that the Counter-Claim of the Defendant, Calvin Howell, is hereby dismissed with prejudice...

A separate hearing on damages was held on January 22, 2002. Following the hearing, both parties submitted their proposed Findings of Fact and Conclusions of Law. On June 4, 2002, the trial court entered its "Findings of Fact and Conclusions of Law," which reads, in relevant part, as follows:

> CONTENTIONS OF THE PARTIES
>
> 16. Plaintiff contends that it is entitled to recover from Defendant an approximate sum of $269,223.01 as total damages arising from Defendant's breach of the lease agreement. The damages claimed by Plaintiff may be divided into the following categories: (a) theft losses; (b) miscellaneous damages for locks, moving expenses, expenses for security, etc.; and (c) damages due to increased rental costs.
>
> 17. On the other hand, Defendant contends that Plaintiff is only entitled to recover the total sum of $5,837.50, for his breach of said lease, which would include $272.50 for the expense of installing bolt locks on the doors to its offices and $5,565.00 for moving expenses to the Pembrook Square building at 113 South Main. All other claims of Plaintiff are denied.
>
> FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the testimony and the record, the Court finds as follows:

18. The lease for the 67 Madison property, by its terms, was to run from November 1, 1997 to October 31, 2003, and involved approximately 9,900 square feet of floor space.

19. Upon vacating the leased premises, the Hardison Law Firm entered into a sublease with The Equitable Life Assurance Society for 11,358 square feet of office space located at the Pembrook Square building, 113 South Main Street, Memphis, which by its terms was to run between July 26, 1999 and December 30, 2007.

20. The general rule is that damages in a breach of contract case are to be measured so as to place plaintiff in the position he would have been in had the breach of contract not occurred. See BVT Lebanon Shopping Center v. Wal-Mart, 48 S.W.3d 132 (Tenn. 2001).

21. A tenant harmed by a landlord's breach of commercial lease is entitled to recover all damages it has sustained as a proximate result, so long as such damages are reasonably shown and are capable of reasonably accurate measure. Ferrell v. Elrod, 469 S.W.2d 678, 689 (Tenn. Ct. App. 1971), *cert Denied* 1971. The purpose of such damages is to put the tenant in as good a position as it would have been in if it had received what it bargained for. Id. at 687.

22. However, a party aggrieved by breach of contract is generally not entitled to be put in a better position by recovery of damages than it would have been in had the contract been fully performed. Action Ads, Inc. v. William B. Tanner Co., Inc., 592 S.W.2d 572, 575-76 (Tenn. Ct. App. 1979), *cert. Denied* 1979.

RELOCATION/PURCHASE COST OF NEW TELEPHONE SYSTEM

36. Plaintiff claims a $7,000.00 damage as the cost of moving telephone services which was necessitated because of Defendant's breach. Mr. Potter testified that to move the old system to the new office would have cost at least $10,000.00. Instead, Plaintiff opted to purchase a new system that cost $26,000.00.

37. In 1997, Plaintiff moved its existing telephone system to Defendant's building at a cost of $7,000.00.

38. Defendant's own expert, D.D. Malmo, in response to the Court's questions, confirmed that Plaintiff's $7,000.00 claim here is more than reasonable because the typical cost for such a move runs from $1.00 to $2.00 per square foot on the rental space here, the normally expected cost would have been nearly $20,000.00.

39. The Court finds that Plaintiff would not have had to move or purchase a telephone system had Defendant not breached the lease contract here and that Plaintiff's claim of $7,000.00 is more than reasonable and is allowed.

SECURITY/CLEANING SERVICE

40. Plaintiff took steps to mitigate its losses and to protect its employees, properties and the integrity of its office by providing its own security after making numerous complaints to Defendant about the lack of security. Plaintiff suspected that the cleaning service personnel may have been involved in said thefts and/or burglaries.

41. Even after Plaintiff provided security during weekdays, there was a theft with forced entry that occurred on a weekend. Plaintiff again requested Defendant to provide security and a bonded cleaning service. Defendant refused. Thus, Plaintiff hired a combined cleaning/security service at a cost less than a security firm alone had been charging.

42. Plaintiff paid a total of $41,299.50 for this combined cleaning/security service, which was substantially less than what it would have cost (by Wells Fargo) just for the security service alone.

43. While the Court finds that Plaintiff was entitled to hire security guards to compensate for security problems at the building, the proof offered by the firm does not distinguish between the cost of cleaning services provided by the guards it hired, which were duplicative of services offered by Defendant Howell through the use of non-bonded cleaning personnel and actual guard services.

44. Mr. Potter testified that the firm chose to use bonded guards to do its cleaning because it suspected that personnel hired by Defendant Howell might have been responsible for the burglaries; however, the firm offered no proof actually linking Defendant's cleaning personnel to the crimes.

45. The Plaintiff is not entitled to damages for its voluntary duplication of cleaning services provided by Defendant based only upon Plaintiff's unsubstantiated suspicions.

46. Since the Court is unable to discern what portion of the $41,299.50 in damages that Plaintiff seeks for the guards it hired, represents cleaning versus security services the Court will allow only fifty-five (55%) percent of said amount as damages to Plaintiff for replacement security services ($22,714.73).

DAMAGES DUE TO INCREASED RENTAL COSTS

47. Plaintiff was forced to terminate the lease and relocate its office because of Defendant's breaches and his continuing refusal to remedy them.

48. The doctrine of constructive eviction gives a tenant the right to terminate a lease in addition to the right to seek damages for the breach of an express or implied covenant contained in the lease.

49. The tenant harmed in a breach of commercial lease is entitled to recover all damages it has sustained so long as the damages are reasonably shown and are capable of reasonably accurate measure. Ferrell v. Elrod, 469 S.W.2d 678, 689 (Tenn. Ct. App. 1971). The "value' of the rights of a lessee is therefore measured by the amount of pecuniary loss he sustains by being deprived of such rights. If the lessee is reasonably able to find substitute premises to occupy, he is obligated to minimize his damages by doing so. Id**.** If other suitable premises are not available, so much more the value of the lessee's rights, and so much more his damages for being deprived of his rights. **Id.**

50. If plaintiff fails to exercise reasonable effort to mitigate damages caused by defendant's breach of contract, and plaintiff's injuries are consequently increased, then plaintiff cannot recover for amount by which his injuries were so increased. Burden of showing that losses could have been avoided by plaintiff by reasonable effort to mitigate damages after defendant's breach of contract is on defendant who breached contract. Tampa Elec. Co. v. Nashville Coal Co., 214 F.Supp. 647 (M.D. Tenn. 1963).

51. In Ferrell v. Elrod, the Defendant contended that the difference in rental required by the first and second leases should not be

included in damages because the two properties are not identical. There was evidence that the second lease involved more desirable premises, but there was also evidence of undesirable features of the second premises which offset its advantages and rendered it no more desirable than the Elrod property. Id**.** The Court concluded that complainants had shown the five year lease with five year renewal option was the best substitute obtainable for the breached ten year lease and that the showing was a valid basis for computation of damages unless the defendant should show otherwise, and he had not done so.

52. The Office Lease Agreement between Plaintiff and Defendant required Defendant to provide a "Class A" building and rental space to Plaintiff.

53. The Lease Agreement defines "Class A" space as follows:

> A Class "A" Building is one of the most prestigious buildings in a given market, competing for premier office tenants. Said buildings have high quality standard finishes, state of the art systems, lobbies and common areas, exceptional accessibility and a definite market presence. (Exhibit C. to Office Lease Agreement).

54. Defendant's building at 67 Madison Avenue as well as Plaintiff's newly rented space at 119 South Main Street are both located in the downtown area, within reasonable proximity to legal centers and the courthouse.

55. Defendant called D. D. Malmo, a real estate agent, to testify as an expert in this case. Mr. Malmo compared the lease agreement between Plaintiff and Defendant with the sublease agreement of Plaintiff and Plaintiff's new subleasor. Mr. Malmo testified that, in his opinion, there was "probably" other comparable space available for rent in downtown Memphis at the same rental as Plaintiff was paying Defendant. He listed the 100 N. Main Building as an example. He also opined that Plaintiff's new rental space was in a building with more "amenities" than Defendant's building.

56. Defendant's expert, Mr. Malmo, had previously rented to Plaintiff and Plaintiff left his building, Brinkley Plaza, to move to

Defendant's. The Court notes, further, that Mr. Malmo admitted that Defendant's building was not as good as Brinkley Plaza.

57. Mr. Malmo admitted that while Brinkley Plaza and 119 South Main were "Class A" buildings with "Class A" amenities, the 100 North Main Building was not and neither was the Defendant's building. He also conceded that 100 North Main Building is not one of the premier buildings but it is as "nice or nicer" than 67 Madison Avenue. Thus, to argue, as Defendant did, the Plaintiff could or should have moved to the 100 North Main Building would require Plaintiff to abandon the benefit of its bargain with Defendant.

58. It is unrebutted that Plaintiff's newly rented space at 119 South Main Street is "Class A" space, the same level or quality of building and space for which Defendant contracted to provide the Plaintiff. Thus, Defendant cannot be heard to complain about the quality of the new space obtained by Plaintiff. The Plaintiff is entitled to recover the benefits of its bargain as Plaintiff had contracted with Defendant.

59. The Court finds, therefore, that Plaintiff's claims for damages in the form of increased rental cost is reasonable and that Plaintiff is entitled to recover the difference between what Plaintiff is required to pay per square foot for the new space Plaintiff obtained after Defendant's breaches, to be measured over what was to be the contracted life of Plaintiff's lease with Defendant and what Plaintiff would have paid Defendant over that same period, less a credit to Defendant for the value of the 33 additional parking spaces Plaintiff received at the new location.

60. Mr. Potter presented Plaintiff's rental increase calculations as the difference between the two leases during the relevant period as being $196,124.66.

61. Notwithstanding Plaintiff's calculations of additional rental expenses, Defendant Howell is entitled to a credit equal to the value of 33 additional garage parking spaces it acquired in the move to Pembroke Square.

62. The uncontroverted testimony of Mr. Malmo indicates that each of the 41 spaces involved was worth $65.00 per month.

63. Over the remaining life of the breached lease, from July 1999 to October 2003 (52 months), their total value amounts to ($65 x 33 x 52) $111,540.00.

64. This credit would reduce the rental damages sought by Plaintiff to $84,584.66.

65. The Court does not agree with Plaintiff's contention that any reduction in its increased rental damages due to the additional parking spaces should be more than offset by the "costs and expenses to Plaintiff's business caused by the disruptions and chaos entailed in moving." No proof was adduced at trial to support the award of damages for such conjecture. It may very well be that Plaintiff's business at the new upscale location was enhanced rather than diminished.

CONCLUSION

66. For all of the above reasons, the Court finds that Plaintiff is entitled to recover from the Defendant damages in the total amount of $120,136.91, consisting of:

272.50	costs of locks
5,565.00	moving expense
7,000.00	telephone expense
22,714.73	security expense
84,584.66	increased rental costs
120,136.91[sic][2]	TOTAL DAMAGES

On June 24, 2002, Hardison filed a Motion for Attorney's Fees and Costs, along with supporting documentation. A Final Judgment was entered on June 11, 2002. The Final Judgment reads, in relevant part, as follows:

> This cause came upon to be heard before the Honorable Walter L. Evans, Chancellor, Part I, upon Plaintiff's Motion for Summary Judgment, Defendant's responses thereto, the admission of facts, the January 22, 2002 hearing on damages, the testimony of the parties, the arguments of counsel and the entire record and the Chancellor having rendered his findings of fact and conclusions of law, the same being attached hereto and incorporated herein by

[2] The correct Total Damages should be $120,136.89.

> reference and upon Plaintiff's motion to alter or amend those findings to provide for an award of attorney's fees and expenses pursuant to paragraph 33 of the lease agreement, which motion is well-taken and, therefore, granted.
>
> IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Petitioner have and recover judgment against the Defendant, Calvin Howell, in the amount of $120,136.91 plus recovery of attorneys' fees of $18,019.54 and out-of-pocket expenses for $1,942.55 along with the costs of this cause for all of which execution may issue.

On August 6, 2002, Howell filed his Notice of Appeal. On August 8, 2002, Hardison filed its Notice of Cross-Appeal. On September 13, 2002, Howell filed a Motion for Stay Pending Appeal. Howell's Motion was granted by Order entered September 20, 2002.

Howell raises the following issues for review, as stated in his brief:

> 1) Whether Chancellor Walter L. Evans erred both by granting Hardison partial summary judgment as to the issue of liability and finding Howell to be in breach of the Lease Agreement dated July 31, 1997 as amended, and by dismissing Howell's Counter-Claim?
>
> 2) Assuming arguendo that Chancellor Evans did not err on the issue set forth in No. (1) above, whether he erred in his assessment and calculation of damages for Howell's breach of the Lease Agreement?

In its brief, Hardison asserts that the issue of partial summary judgment was correctly decided in its favor based upon the undisputed facts and that the Chancellor also correctly rejected Howell's waiver/estoppel argument. In addition, Hardison raises the following additional issues for review as stated in its brief:

> II.
> Whether the Chancellor erred by failing to award
> Plaintiff all of its proven consequential damages as to:
>
> A.
>
> Whether Plaintiff was entitled to recover $41,299.50
> for payment for security.
>
> B.

Whether Plaintiff was entitled to recover $196,124.66 in damages due to increased rental costs resulting from Defendant's breach.

III.

Whether the Chancellor correctly ruled as to: (A) The Mitigation issue; (B) Attorney's fees and costs; (C)Telephone expenses; and (D) the Conceded Moving expenses

We first address the issues involving Howell's liability under the Lease:

Summary Judgment

Resolution of the question of liability in this case is solely dependent upon the construction of the provisions of the Lease signed by the parties hereto. The language used in a contract must be taken and understood in its plain, ordinary, and popular sense. ***Bob Pearsall Motors, Inc. v. Regal Chrysler- Plymouth, Inc.***, 521 S.W.2d 578 (Tenn.1975). In construing contracts, the words expressing the parties' intentions should be given the usual, natural, and ordinary meaning. ***Ballard v. North American Life & Cas. Co.***, 667 S.W.2d 79 (Tenn.Ct.App.1983). If the language of a written instrument is unambiguous, the Court must interpret it as written rather than according to the unexpressed intention of one of the parties. ***Sutton v. First Nat. Bank of Crossville***, 620 S.W.2d 526 (Tenn.Ct.App.1981). A contract is not ambiguous merely because the parties have different interpretations of the contract's various provisions, ***Cookeville Gynecology & Obstetrics, P.C. v. Southeastern Data Sys., Inc.***, 884 S.W.2d at 462 (citing ***Oman Constr. Co. v. Tennessee Valley Auth.***, 486 F.Supp. 375, 382 (M.D.Tenn.1979)), nor can this Court create an ambiguity where none exists in the contract. ***Cookeville P.C.***, 884 S.W.2d at 462 (citing ***Edwards v. Travelers Indem. Co.***, 201 Tenn. 435, 300 S.W.2d 615, 617-18 (Tenn.1957)). Courts cannot make contracts for parties but can only enforce the contract that the parties themselves have made. ***McKee v. Continental Ins. Co.***, 191 Tenn. 413, 234 S.W.2d 830 (Tenn.1950). The interpretation of a written contract is a matter of law and not of fact. ***See Rainey v. Stansell***, 836 S.W.2d 117 (Tenn.Ct.App.1992).

A motion for summary judgment should be granted when the movant demonstrates that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. ***See*** Tenn. R. Civ.P. 56.04. The party moving for summary judgment bears the burden of demonstrating that no genuine issue of material fact exists. ***See Bain v. Wells***, 936 S.W.2d 618, 622 (Tenn.1997). On a motion for summary judgment, the court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence. Summary judgment is a preferred vehicle for disposing of purely legal issues. ***See Byrd v. Hall***, 847 S.W.2d 208 (Tenn.1993); ***Bellamy v. Federal Express Corp.***, 749 S.W.2d 31 (Tenn.1988). Since the

construction of a written contract involves legal issues, construction of the contract is particularly suited to disposition by summary judgment. ***Browder v. Logistics Management, Inc.***, 1996 LEXIS Tenn.App. 227 (Tenn.Ct.App.1996). Since only questions of law are involved here, there is no presumption of correctness regarding the trial court's grant of summary judgment. ***Bain*** at 622. Therefore, our review of the trial court's grant of summary judgment is ***de novo*** on the record before this Court. ***Warren v. Estate of Kirk***, 954 S.W.2d 722, 723 (Tenn.1997).

The relevant portions of the Lease at issue in this case read as follows :

> 11. Services by Landlord:
>
> (a) So long as Tenant is not in default under the Lease, Landlord agrees to make available for the occupied portion of the Leased Premises the following services:
>
> * * *
>
> (viii) Building security for public areas, including, but not limited to, totally automated fire and alarm systems, twenty four hours per day, seven days per week, and at least one security guard on the premises twenty four hours per day, seven days per week.

There is no ambiguity in the language of this Lease. Mr. Howell was required to provide "at least one security guard on the premises twenty four hours per day, seven days per week." Concerning his fulfillment of this obligation, the facts are undisputed. In both his Answer to Hardison's Complaint and in his Answers to Hardison's Request for Admissions, Howell admits that he did not provide around the clock security for the Property. This unrebutted admission on the part of Howell clearly satisfies the first criterion for summary judgment in that there is no dispute of material fact. As to the second criterion–whether Hardison is entitled to summary judgment as a matter of law, we find that the relevant portions of the Lease, as discussed *supra*, contain no ambiguity. Since this Court is barred from creating an ambiguity where one does not exist, ***Cookeville P.C.***, 884 S.W.2d at 462, we find that Howell was required to provide a security guard for the Property 24 hours per day, 7 days per week. By his own admission, he failed to meet this obligation and, thus, breached the agreement. Consequently, the trial court did not err in granting Hardison's Motion for Summary Judgment on the issue of liability.

Howell's Counter-Claim

According to Howell, in or about the Spring of 1998, he discovered that Hardison was occupying approximately 1,200 square feet of space in the building, which they were not paying for and not authorized to occupy under the Lease. In a subsequent meeting between Howell and Hardison, Howell asserts that the parties reached an oral agreement, whereby Hardison would be allowed to continue its occupation of the 1,200 square feet in exchange for Howell no longer

being required to provide 24 hour per day, 7 day per week security. In his counter-claim, Howell asserts that, based upon this oral agreement, Hardison is estopped from alleging that Howell's failure to provide a security guard around the clock is grounds for termination of the Lease. We cannot agree.

As the trial court correctly points out in its Order dismissing Howell's Counter-Claim, paragraph 29 of the Lease clearly requires amendments and changes to the Lease to be in writing, to wit: "This lease shall not be amended, changed, or extended except by written instrument signed by both parties hereto."

T.C.A. § 47-50-112(c) states, in relevant part:

> If any...contract contains a provision to the effect that no waiver of any terms or provisions thereof shall be valid unless such waiver is in writing, no court shall give effect to any such waiver unless it is in writing.

Despite the unambiguous language of both the Lease and the above referenced statute, relying upon the case of ***Tidwell v. Morgan Bldg. Systems, Inc.***, 840 S.W.2d 373 (Tenn. Ct. App. 1992), Howell asserts that the alleged oral agreement between the parties did not change the terms of the original Lease in violation of the statute but rather created a separate agreement involving matters outside the contemplation of the original contract (i.e. Hardison's occupation of the additional 1,200 square feet). However, we find that Howell's reliance upon ***Tidwell*** is misplaced. Unlike the case as bar, the parties in ***Tidwell*** mutually agreed to rescind their original contract by both agreeing to a larger building. ***Id.*** at 376.

It is well settled that mutual abandonment, cancellation, or rescission of a contract must be clearly expressed, and acts and conduct of parties, to be sufficient, must be positive, unequivocal, and inconsistent with the existence of a contract, since conduct which is not necessarily inconsistent with continuance of the contract will not be regarded as showing an implied agreement to discharge the contract, even though it may be consistent with such an agreement. ***Arkansas Dailies , Inc. v. Dan***, 260 S.W.2d 200, 203 (Tenn. Ct. App. 1953). It is undisputed that Hardison sent two letters, dated July 6, 1998 and July 17, 1998 respectively, which Howell admits he received. These letters, dated **after the spring of 1998** (when the oral agreement was alleged to have occurred), again put Howell on notice that he is in breach of the Lease by failing to provide security. Hardison's dispatch of these letters is clearly not "inconsistent with the existence of a contract." Rather, these written demands evidence a contract that was still very much in existence after the spring of 1998 and negates Howell's reliance upon ***Tidwell*** in that the parties had not, based upon the evidence in record, mutually agreed to rescind the Lease.

Finally, Howell argues that, although Hardison never orally accepted his offer of more space for less or no security, Hardison's continued occupation of the 1,200 square feet proves

their assent to the new agreement and estops them from alleging that Howell breached by not providing security. We disagree. To give rise to estoppel by silence or inaction, there must be not only an opportunity to speak or act, but also an obligation or duty to do so. ***State ex Rel Grant v. Prograis***, 979 S.W.2d 594, 601 (Tenn. Ct. App. 1997). Even if we allow as true the facts asserted by Howell concerning the alleged oral agreement between the parties, we find that Hardison would nonetheless have had no duty to respond. Hardison's silence, therefore, cannot be a basis for estoppel.

For the foregoing reasons, we affirm the Order of the trial court, granting Hardison partial summary judgment on the issue of liability and dismissing Howell's counter-claim.

We now turn to those issues concerning damages incurred by Hardison as a result of Howell's breach. Since the hearing on damages was held by the court sitting without a jury, we review the case ***de novo*** upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. ***See*** Tenn. R. App. P. 13(d).

It is well settled that the measure and elements of damages upon the breach of a lease is governed by the general principles which determine the measure of damages on claims arising from breaches of other kinds of contracts. The general rule of contracts, to the effect that the plaintiff may recover damages only to the extent of its injury, applies to leases. Damages for breach of a lease should, as a general rule, reflect a compensation reasonably determined to place the injured party in the same position as he would have been in had the breach not occurred and the contract been fully performed, taking into account, however, the duty to mitigate damages. In addition, damages resulting form a breach of a lease must have been within a contemplation of the parties; must have been proximately caused by the breach; and must be ascertainable with reasonable certainty without resort to speculation in conjecture. ***See*** 49 Am. Jur. 2d Landlord & Tenant § 96 (2003).

A tenant harmed by a landlord's breach of a commercial lease is entitled to recover all damages it has sustained as a proximate result, so long as such damages are reasonably shown and are capable of reasonably accurate measure. ***Ferrell v. Elrod***, 469 S.W.2d 678, 689 (Tenn. Ct. App. 1971). These damages may include one or more of the following items as may be appropriate so long as no double recovery is involved:

> (1) [I]f the tenant is entitled to terminate the lease and does so, the fair market value of the lease on the date he terminates the lease; (2) the loss sustained by the tenant due to reasonable expenditures made by the tenant before the landlord's default which the landlord at the time the lease was made could reasonably have foreseen would be made by tenant;

> (3) if the tenant is entitled to terminate the lease and does so, reasonable relocation costs;
>
> * * *
>
> (5) if the use of the leased property contemplated by the parties is for business purposes, loss of anticipated business profits proven to a reasonable degree of certainty, which resulted from the landlord's default, and which the landlord at the time the lease was made could reasonably have foreseen would be cause by the default;
>
> (6) if the tenant eliminates the default, the reasonable costs incurred by the tenant in eliminating the default; and
>
> (7) interest on the amount recovered at the legal rate for the period appropriate under the circumstances.

Restatement (Second) of Property: Landlord & Tenant § 10.2 (1977).

In the instant case, Howell contends that the trial court erred in awarding Hardison damages for monies Hardison spent in hiring its own security/cleaning company for the Property, monies Hardison spent in moving its telephone system to the new location, monies Hardison will pay in increased rents at its new location over the term of the old Lease, monies Hardison spent in moving its offices, and monies awarded to Hardison for legal fees and expenses incurred in this suit. We will address each of these assignments of error in turn.

Damages for Security/Cleaning Company

Because of Howell's failure to provide around the clock security for the Property, Hardison, after notice and demand to cure, hired its own security. Mr. Potter testified that Hardison's concerns were not only with the lack of a security guard but also involved suspicion that the cleaning crew employed by Mr. Howell may have been involved in some of the theft:

> A [by Mr. Potter]. Well, one of the problems that we [Hardison] addressed with Mr. Howell was the fact that we wanted–we were concerned that the cleaning people that we had no history with may have been part of the [theft] problem.
>
> So we requested bonded cleaning people to come in and clean our premises. And when he [Howell] refused to do that, then we, as part of–we wanted a presence in the office during–when The Hardison Law Firm was not there, we wanted people there.

> And as part–since he [Howell] would not provide bonded cleaning people after we requested it, we got the security people to do the cleaning.

It is undisputed that Hardison paid a total of $41,299.50 for this security/cleaning service. It is also undisputed that Hardison neither provided evidence to link Howell's cleaning crew to the thefts, nor have formal charges been sought in that regard. Hardison also concedes that their offices were satisfactorily cleaned by Howell's crew. The trial court found that Hardison "is not entitled to damages for its voluntary duplication of cleaning services provided by [Howell]...." While we agree with the trial court's finding, Hardison paid one fee for these combined service and no testimony was offered at the hearing to indicate what percentage of the $41,299.50 was for security services and what percentage was for cleaning services. In the face of this dilemma, the trial court ruled as follows:

> Since the Court is unable to discern what portion of the $41,299.50 in damages that Plaintiff seeks for the guards it hired, represents cleaning versus security services the Court will allow only fifty-five (55%) percent of said amount as damages for replacement security services ($22,714.73).

On appeal, Howell contends that Hardison should receive none of these damages because they are speculative. Hardison contends that they are entitled to the full amount of $41,299.00 since they would not have incurred any of these costs but for Howell's breach.

The undisputed testimony at the hearing was that Hardison was able to hire the combined security/cleaning crew for less that they had initially paid for security alone:

> Q [to Mr. Potter]. What did you [Hardison] pay Wells Fargo?
> A. $25 an hour
>
> Q. And were you able to find someone that would give you security for less per hour?
>
> A. We did.
>
> Q. What did you pay them?
>
> A. Initially, I think we started paying them $20 an hour. And I was able to reduce that, and the documents show it, over–I think it was closer to, I want to say, $12 an hour.

Exhibit 7 shows that Hardison incurred expenses for security from 7/20/98 until 6/25/99. Rather than seeking less expensive alternatives, Hardison could have continued to pay Wells Fargo $25 per hour, and could have employed them 24 hours per day 7 days per week, in its effort to mitigate the damages caused by Howell's failure to provide security. Had Hardison continued to use Wells Fargo for security alone, the damages would have been substantially more that $41,299.50 (e.g. $25 per hour x 24 hours per day x 365 days per year = $219,000). The fact that Hardison was able to get two services for less than the price of security alone should not be held against them, particularly since their frugality ultimately worked a benefit to Mr. Howell.

There is no evidence on which to base a determination of what percentage of the $41,299.50 was for security versus cleaning. Having no evidentiary basis, we find that the trial court's award of only 55% of the total is arbitrary. The only evidence in the record is that Hardison would have incurred more expense by hiring security alone. We, therefore, modify the judgment of the trial court to award Hardison the full $41,299.50.

Telephone System

Hardison claims $7,000 in expenses incurred for moving its phone system to the new offices. In fact, Hardison did not move its existing phone system but, rather, opted to upgrade. The undisputed testimony is that Hardison, in fact, paid $26,000.00 for a new phone system. Hardison arrives at the $7,000 figure because that is the cost that it incurred to move its existing phone system to Howell's building in 1997. Howell's expert, D. D. Malmo, in response to the trial court's question, indicated that $7,000.00 is less than it would have actually cost for Hardison to move its existing phone system:

> THE COURT: Based on your [Malmo's] experience, what would be the average cost for moving telephone services and moving office furniture and fixtures for the 8,000 to 10,000 square foot space that The Hardison Firm had?
>
> THE WITNESS: I [Malmo] would say probably–I would say that on average, you can count on between $1 and $2 a square foot in moving expenses moving the FF&E, the phones, things like that.

Howell contends that Hardison's claim for damages for moving the phone lines should have been denied by the trial court because it fails to meet the reasonable certainty requirement of Tennessee law. We disagree.

It is well settled that courts will allow recovery even if it is impossible to prove the exact amount of damages from breach of contract. ***Cummins v. Brodie***, 667 S.W.2d 759, 765 (Tenn. Ct. App. 1983). Uncertain and speculative damages are prohibited only when the existence of damages is uncertain, not when the amount is uncertain. ***Id***. When there is substantial evidence

in the record relative to damages and reasonable inferences may be drawn therefrom, mathematical certainty is not required to support award of damages. ***Id***.

It is undisputed that Hardison would not have had to move or purchase a telephone system had Howell not breached the Lease. Rather than claiming the entire cost of the new system ($26,000.00), or even the actual costs that it would have incurred to move the old system (9,779 square feet x $1 per square foot (the lesser of the $1 to $2 estimate given by Malmo) = $9,779.00), Hardison claimed only $7,000, the cost of moving the system in 1997. Consequently, Howell's argument that $7,000 is not reasonable was correctly rejected by the trial court in awarding Hardison $7,000 in damages for moving its phone system.

Moving Expenses

On appeal, Howell argues that Hardison is not entitled to recover the $5,565.00 in moving expenses because Hardison would eventually have had to pay its moving expenses at the expiration of the Lease. According to Howell, such expenses are, "...not incidental costs caused by [Howell's] alleged breach...." However, in its Proposed Finding of Fact and Conclusions of Law," Howell makes the following, relevant, concession:

> 6. The parties in the case at hand do not contest the amount of moving expenses claimed, and the Court finds that The Hardison Firm is entitled to received $5,565.00 in compensatory damages for its moving costs.

Having conceded the issue at the trial level, Howell cannot be heard to complain on appeal. This issue is without merit.

Increased Rents/Mitigation

It is uncontested that Howell breached the Lease by failing to provide around the clock security for the Property. Under the doctrine of constructive eviction, Hardison was entitled to terminate the Lease and vacate the Property, which it did. The Restatement (Second) of Property addresses a tenant's right to recover reasonable relocation expenses and reads, in pertinent part, as follows:

> The tenant is not faced with a relocation problem unless he terminates the lease as a result of the landlord's default. The landlord should always foresee that a tenant whose lease is prematurely brought to an end will incur relocation expenses. Relocation will usually involve moving costs, expenses of obtaining a lease of other property, adapting the tenant's furnishings to a new location, **and an increase in rental for a *comparable* new location**...

Restatement (Second) Property: Landlord & Tenant § 10.2 cmt.d (1977) (emphasis added).

Clearly Hardison is entitled to recover increased rental costs for **comparable** space. However, the gravamen of this issue rests on the question of whether, given the state of the commercial real estate market at the time Hardison left Howell's building, the new office space was comparable to what Hardison had bargained for under its Lease with Howell. In ***Ferrell v. Elrod***, 469 S.W.2d 678 (Tenn. Ct. App. 1971), this Court held that:

> If the lessee is reasonably able to find substitute premises to occupy, he is obligated to minimize his damage by doing so. If other suitable premises are not available, so much more the value of lessee's rights, and so much more his damages for being deprived of his rights.

Id. at 689

In ***Ferrell***, the Defendant argued that the difference in rental between the first and second leases should not be included in damages because the two properties were not identical. There was evidence that the second lease involved more desirable premises, but there was also evidence of undesirable features of the second premises, which offset its advantages. ***Id***. at 690. The ***Ferrell*** Court concluded that "complainants have shown that the five year lease with five year renewal option was the best substitute obtainable for the breached ten year lease. This showing is a valid basis for computation of damages unless the defendant should show otherwise, and he has not done so." ***Id.***

The Lease at issue in this case clearly requires Howell to provide a "Class A" building. Exhibit C to the Lease defines a "Class A" building as "one of the most prestigious buildings in a given market, competing for premier office tenants. Said buildings have high quality standard finishes, state of the art systems, lobbies and common areas, exceptional accessibility and a definite market presence."

Howell's expert, D. D. Malmo, testified that, in his opinion, there was "probably" other comparable space available for rent in downtown Memphis at the same rent Hardison was paying Howell. Malmo listed 100 N. Main as an example:

> Well, I [Malmo] think that the average rental rate that they [Hardison] were paying at 67 Madison [Howell's building] was around $10.85 a foot....
>
> So $10.85 a foot, I think if you went to the building manager or the leasing manager at the 100 North Main Building in 1999 and told him that you would lease between 8,000 and 11,000 square feet and, could I lease it for five or six or seven years at an average rate of

> $10.85, I think he would have been able to lease the space for that amount.

Although Malmo testified that Hardison could have obtained space in the 100 North Main Building for a rental rate comparable to that it was paying in Howell's building, we cannot overlook the fact that, under the Lease, Hardison bargained for a "Class A" building; and due to Howell's breach, Hardison is entitled to the benefit of its bargain. Because of the terms of this particular Lease, the question is not whether there were other suitable buildings available to Hardison at a comparable rental rate but, rather, whether there were other "Class A" buildings available. Concerning this question, Mr. Malmo testified, in relevant part, as follows:

> THE COURT: You [Malmo] mentioned the 100 North Main Building as being a comparable–having comparable space, I believe you said.
>
> Is there any other building in the downtown area that you would classify in the class-A standard, comparable rate standard, as 67 Madison?
>
> THE WITNESS: Oh, there are probably a couple of buildings, and probably were a couple of building[s] at that time that could be comparable, I guess, in class and rate. 44 North Second would probably have been a building that would be comparable.
>
> THE COURT: With 8,000 to 10,000 square feet available?
>
> THE WITNESS: At that time, probably not, no, sir. 147 Jefferson might be a comparable building to 67 Madison, and there probably was–I'm confident there was 8,000–
>
> THE COURT: But they would not be classified as standard-A--or class-A?
>
> THE WITNESS: Well, no. Those buildings would not, that's true. The 100 North Main Building is probably not considered a class-A building either, though.

Since the buildings Mr. Malmo mentions, which would have rented at a rate comparable to 67 Madison, are not "Class A" buildings, Hardison was under no obligation to mitigate its damages by moving into one of them. Had Hardison moved its offices to 100 North Main, as Howell suggests it should have, Hardison would have lost the benefit of its bargain–a "Class A" building. It is undisputed that Hardison's new offices at 119 South Main Street are in a "Class A" building. The evidence does not preponderate against the trial court's finding that Hardison properly mitigated its damages while retaining the benefit of its bargain in moving its offices to

119 South Main. Hardison is, therefore, entitled to the $196,124.66 in increased rents over the term of the old Lease.

It is also undisputed that, under its new lease, Hardison received 41 parking spaces. Under the Lease with Howell, Hardison was to receive 8 parking spaces. The uncontroverted testimony of Mr. Malmo indicates that each of the 41 parking spaces at the new location was worth $65 per month. Over the remainder of the breached Lease, from July 1999 to October 2003 (52 months), the total value of these parking spaces amounts to ($65 x 33 spaces x 52 months) $111,540.00. Although Hardison argues that the $196,124.66 in increased rents should not be reduced by the $111,540.00 benefit it received from 33 additional parking spaces, we disagree. Hardison's contention that the added benefit of the 33 parking spaces was offset by "costs and expenses to [Hardison's] business caused by disruptions and chaos entailed in moving" is not supported by evidence. There was no evidence offered at the hearing as to what, if any, profits Hardison lost as a result of its having to move offices. Since the evidence in record does not preponderate against the trial court's finding that Hardison was entitled to its increased rental costs minus the added benefit of 33 parking spaces, we affirm the award of $84,584.66.

Attorney's Fees and Expenses

Paragraph 33 of the parties' Lease provides for the payment of attorney's fees as follows:

> In the event either party defaults in the performance of any of the terms, covenants, agreements, or conditions contained in this Lease and the other party places in the hands of an attorney the enforcement of all or any party of this Lease, the collection of any rent due or to become due or recovery of the possession of the Leased Premises, the non-prevailing party agrees to pay the prevailing party's costs of collection including reasonable attorneys' fees for the services of the attorneys, whether suit is actually filed or not.

When Hardison filed its Motion for Attorney's Fees and Costs, along with Affidavits and Exhibits in support thereof, Howell neither filed a response nor opposed the award of reasonable attorney's fees in any other way. On appeal, Howell argues that, under the terms of Paragraph 33 of the Lease, Hardison is not entitled to attorney's fees because Paragraph 33 contemplates fees incurred in the process of "collection" only. We disagree. In the first place, Howell's failure to object to or oppose the award of attorney's fees at the trial level should preclude him from raising the issue on appeal. However, even if we allow Howell to pursue the issue, the plain language of Paragraph 33 clearly contemplates that the non-prevailing party will pay the other party's attorney's fees arising from the breaching party's default in "the performance of *any* of the [Lease's] terms." Hardison's attorney fees clearly arise from Howell's breach of the term requiring Howell to provided around the clock security. Under the Lease, Hardison is entitled to

recover these fees and costs. Since the evidence does not preponderate against the trial court's award of $18,019.54 for legal fees and $1,942.55 for expenses, we affirm.

For the foregoing reasons, we modify the Final Judgment of the trial court to reflect an award of the full $41,299.50 Hardison paid for security/cleaning services. Consequently, the Final Judgment for Hardison against Howell is $138,721.66 plus attorney's fees of $18,019.54 and expenses of $1,942.55. As modified, the Final Judgment is affirmed in all other respects. Costs of this appeal are assessed against Appellant, Calvin Howell, and his surety.

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W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.