FIRST DIVISION
August 7, 2017

No. 1-16-1070
2017 IL App (1st) 161070-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HIDDEN CHUTES, LLC,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	13 L 8797
DICK BLICK HOLDINGS, INC.,	)	
	)	
Defendant-Appellee.	)	Honorable Raymond W. Mitchell,
	)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held:* Finding that landlord failed to mitigate damages was not against the manifest weight of the evidence; order remanded to clarify whether landlord can recover damages for unpaid rent; landlord could not recover damages for costs of reconfiguring premises for three tenants; affirmed in part and remanded with directions.

¶ 2 After a bench trial, the circuit court found that a landlord, plaintiff Hidden Chutes, LLC (Hidden Chutes) failed to mitigate damages after its tenant, defendant Dick Blick Holdings, Inc. (Blick) left its space before its lease ended. The court also found that Hidden Chutes could not

recover the construction costs for dividing the premises into three spaces. We affirm these findings, but remand for the circuit court to clarify whether Hidden Chutes may recover unpaid rent for the time between when one of the new tenants signed a lease and when that tenant started paying rent.

¶ 3 I. BACKGROUND

¶ 4 The record reveals that Hidden Chutes owned a building located at 33 South Wabash Avenue in Chicago. As part of a 10-year lease that began on November 24, 2010, Blick operated a retail store in approximately 7,292 square feet of space in Hidden Chutes's building. In June 2013, Blick left the space. Blick's rent was $40 per square foot at the time. Hidden Chutes's owner, Newcastle, Limited (Newcastle), went about re-letting the space, and after a few months, Hidden Chutes decided to divide the premises into three spaces. This appeal centers on that decision. Ultimately, three restaurants signed leases. Protein Bar signed a lease on April 10, 2014, for approximately 2,189 square feet at a rate of $61 per square foot for the first year. Goddess and the Baker signed a lease on August 14, 2014, for approximately 1,853 square feet at a rate of $60 per square foot for the first year. KC Peaches, later known as Republic of Good Food, signed a letter of intent on August 12, 2014, and later signed a lease for approximately 3,250 square feet a rate of $60 per square foot for the first year. Hidden Chutes sought damages from Blick's failure to pay rent since July 1, 2013, and Blick asserted that Hidden Chutes failed to mitigate its damages.

¶ 5 At trial, Hidden Chutes presented the testimony of Brennan Hitpas, a vice president at Newcastle, who stated as follows. After Blick left 33 South Wabash, Hitpas worked with Kristen Martin, Newcastle's director of leasing, to market the space. Newcastle initially tried to find a single tenant, but also determined that the space could fit up to three tenants. Ultimately, the

decision was made to divide the space because there was not enough demand from qualified tenants for one space and most of the demand came from smaller tenants.

¶ 6 Hitpas explained the general leasing process. When a tenant expresses serious interest, the parties exchange a letter of intent (LOI), which is a high-level summary of proposed lease terms. Normally, LOIs are negotiated back and forth for 60 to 90 days, and once an LOI is fully executed, it typically takes another 60 to 90 days to execute a lease. Once the parties have an LOI, the landlord can negotiate with other potential tenants for the same space, but it is not normal business practice to do so because it is not seen as acting in good faith.

¶ 7 Martin, who was mainly responsible for leasing the space, testified that her job was to "lease to a creditworthy tenant at a fair market rent" and that she went about re-letting the space in the way that she would any other space. Martin agreed that Blick left the space in great condition. Martin's efforts included placing lease signs in the windows, creating a marketing package, putting information on a multiple listing service and websites, and calling tenants and brokers. Martin determined a market price by looking at comparable properties, recently-signed deals, and other vacant spaces in the same market. Initially, Martin marketed the space to a single tenant, but "[t]here was nothing solid that came across our plate." Three or four months into the leasing efforts, the strategy changed in response to interest from smaller tenants, none of whom were interested in the entire space.

¶ 8 Two scenarios emerged—one for demising the space for two tenants and one for demising the space for three tenants. The two-tenant plan had a 2,189-square-foot space and a 5,093-square-foot space. The three-tenant plan had a 1,853-square-foot space, a 2,189-square-foot space, and a 3,250-square-foot space. Per Martin's calculations, the effective rent per square

foot was higher in the three-tenant plan than in the two-tenant plan. However, there were more chances for a vacancy with multiple tenants.

¶ 9 Among the potential smaller tenants was 123 Sushi, who had been interested in the approximately 1800-square-foot space. An LOI in the record for 123 Sushi was dated November 12, 2013, and did not include signatures. The record also contains an unsigned commission agreement with 123 Sushi's broker that was dated November 25, 2013. 123 Sushi backed out in December 2013 because it needed black iron venting, which could not be accommodated. Native Foods had been interested in a 3,250-square-foot space. An LOI was signed by a representative of Native Foods on November 25, 2013, and by Martin on November 26, 2013. However, Native Foods backed out in December 2013 after it learned that Protein Bar would be a co-tenant. Protein Bar was interested in a 2,189-square-foot space and ultimately became a tenant. Protein Bar's LOI was dated November 26, 2013, and was signed by a representative for Protein Bar on December 2, 2013. Protein Bar's lease was executed in April 2014 and Protein Bar started paying rent in February 2015, which was consistent with the terms of the lease and due to Protein Bar having to wait for the space to be divided before taking possession.

¶ 10 Martin also described negotiations with Home Run Inn, another potential tenant. The record contains an email that Home Run Inn's broker, Doug Renner, sent to Martin and Hitpas on November 26, 2013, at 9:53 a.m. The email states in part:

> "I spoke with Dan in great length. He reiterated that this deal is very important to the company not only for profitability but for branding as well. They are doing their best to stretch their budget to make this attainable and below are the scenarios that work in order of preference:
>
> 1. Size: 5,093 sf

Rent: $58/sf

Escalation: 10% every 5 years

***

2. Size: 3,250 sf

Rent: $63/sf

Escalations: 10% every 5 years

***

In the end, they are willing to bump up the initial rent, but to make the deal work for their economic model, the rent needs to be flat for 5 years with the 10% escalations that was in the original deal. If you can make either of these structures work, they are ready to sign and put this one to bed.

Let there be a reason to be thankful on Thursday!"

¶ 11 About an hour later, Martin emailed Hitpas the following:

"I plugged in Doug's numbers to the worksheet we've been manipulating most recently and it looks like the NFC deal in the three tenant scenario is still our strongest option."

¶ 12 Martin acknowledged that Home Run Inn's offer of $58 per square foot was $18 more per square foot than Blick's rent at the time. However, a decision was made to go with a three-tenant plan with Protein Bar because there was a strong commitment at the time from Native Foods to take the 3,250-square-foot space. Native Foods was farther along in the process than Home Run Inn. Martin also stated that there was "[n]o reason" why Protein Bar could not have taken the 2,189-square-foot space in the two tenant plan.

¶ 13 Kristine Westerberg, vice president of project management for Newcastle, testified that she was asked to come up with a three-tenant plan in late fall 2013. Westerberg oversaw the renovation of 33 South Wabash into three spaces, which included designing and building entire heating, air conditioning, and associated exhaust systems for each space. Construction started in May 2014 and was completed in January 2015. Westerberg agreed that it would have cost less to divide the property into two spaces instead of three.

¶ 14 Blick presented expert testimony from Kenneth Polach, a real estate appraiser and consultant. Polach stated that if the property had been offered for the rent that Blick was paying, the property could have been leased within approximately three months. While the improvements "definitely added substantial value," the construction work was not required to re-let the property. Dividing the property into three smaller spaces allowed the property to be rented at a substantially higher rate than what Blick paid. Polach noted that demising walls were installed and improvements were made to heating, air conditioning, and electrical equipment, all of which would be considered capital improvements. Polach agreed that as a general rule, it is easier to rent smaller spaces than larger spaces.

¶ 15 After the trial, the court ordered the parties to submit simultaneous trial briefs that addressed the appropriate measure of damages "including for the following periods of time:

(a) July 2013 thru November 2013 (on the whole lease);

(b) November 2013 thru April 2014 (on the portion of the lease attributable to the space re-leased [to] Protein Bar);

(c) Any credits due to Defendant for rents received under the Protein Bar lease."

¶ 16 In its posttrial brief, Hidden Chutes itemized its damages per the court's order. Hidden Chutes also contended that under the terms of the lease, Blick had to pay for the costs of altering

the space to obtain replacement tenants, which included dividing the space into three units. Hidden Chutes further asserted that the rent concessions given to the new tenants were commercially reasonable and required to complete each lease. Thus, Blick was not entitled to any set-off for the rent concession periods and Blick's obligations under the lease continued until the new tenants started paying.

¶ 17 Blick's posttrial brief also itemized damages. Blick further contended that Hidden Chutes failed to mitigate its damages because Hidden Chutes refused to re-let the space to Home Run Inn and Protein Bar in November 2013. Blick asserted that Hidden Chutes could have avoided all damages incurred after November 2013 if Hidden Chutes had re-let to Home Run Inn and Protein Bar instead of pursuing a three-tenant plan. According to Blick, Hidden Chutes's goal was to maximize the rental revenue from replacement tenants. Blick further maintained that Hidden Chutes could not recover the costs of capital improvements as a matter of law and that Hidden Chutes did not have to divide the property to re-let it.

¶ 18 The court issued a written order on October 30, 2015, that stated as follows. Hidden Chutes divided the space into three units because there was little interest in the whole space due to its size. Thus, Hidden Chutes did not fail to mitigate by not re-letting the whole, undivided space. However, Hidden Chutes did fail to mitigate when it rejected Home Run Inn's proposed lease for the balance of the space left over after the Protein Bar lease. Hidden Chutes made a business decision that long-term, it preferred having three tenants instead of two. While that long-term objective may maximize the value of the property, Hidden Chutes failed to mitigate because Home Run Inn was willing to sign a lease at $18 more per square foot than Blick's lease. Because the proposed Home Run Inn lease would have reduced or avoided Hidden

Chutes's damages as to 70% of the space—the portion other than the Protein Bar space—the court cut off damages as to 70% of the space as of November 2013.

¶ 19 Turning to damages for unpaid rent, the analysis was "complicated *** because the property was subsequently divided into three smaller spaces and then leased at different rates to three different tenants with leases commencing on three different dates." Hidden Chutes starting receiving rent from the new tenants in February, April, and August 2015. The court stated that the damage analysis would be separated into three periods. For the first period, from July 1, 2013, through November 30, 2013, the damages were $148,182.99. For the next period, from November 2013 through April 2014, and only for the portion of the space leased by Protein Bar, the damages were $57,498.04. Because the Protein Bar lease was for a higher rental rate than Blick's lease, Blick was entitled to a credit for surplus amounts realized under that lease, which totaled $91,841.30.

¶ 20 As for capital improvements, the court found that the testimony clearly established that Hidden Chutes's decision to divide the space was intended to maximize the overall value of the property. The construction costs were not necessary to return the property to a leasable condition because the property was left in "pristine condition." Under *Pioneer Trust & Savings Bank v. Zonta*, 96 Ill. App. 3d 339, 346 (1981), the construction costs reflected a capital improvement in the property and were not recoverable. In total, the court awarded Hidden Chutes $206,964.60 in damages.

¶ 21 On January 19, 2016, Hidden Chutes filed a motion to reconsider, contending in part that it had exceeded its burden to mitigate damages. Hidden Chutes also sought to recover additional unpaid rent for the Protein Bar space. Hidden Chutes noted that there are time lags in the final execution of leases and initial periods in lease terms when tenants do not pay rent. Thus, Hidden

Chutes was not paid rent from July 2013 until February 2015, when Protein Bar began paying rent. Hidden Chutes asserted that the court subjected Hidden Chutes to a double loss because it cut off damages after April 2014 even though the space remained vacant. Hidden Chutes sought an additional $93,000 to account for lost revenue between April 2014 and January 2015. Hidden Chutes also maintained that the lease required Blick to compensate Hidden Chutes for alterations that were needed to re-let the property. Hidden Chutes stated that the total amount of damages for preparing the space for re-letting was $710,842.32.

¶ 22 In response, Blick stated that the court properly cut off a portion of Hidden Chutes's damages incurred after November 2013 because Hidden Chutes failed to mitigate damages as to the space that Home Run Inn would have leased. Blick also asserted that under Illinois law, Hidden Chutes could not recover the capital improvement costs of creating a three-tenant floor plan.

¶ 23 In reply, Hidden Chutes stated in part that Blick did not respond to the argument that the award should be increased by $93,000 to account for damages incurred for the time that Protein Bar was not paying rent.

¶ 24 Additionally, Blick filed a motion to amend the judgment. Blick asserted in part that the court incorrectly awarded damages twice for the same space in November 2013—once for the entire space and once for the part of the space leased to Protein Bar. Hidden Chutes denied that there was a double recovery in November 2013.

¶ 25 On March 17, 2016, the court entered a written order that addressed Hidden Chutes's motion to reconsider and Blick's motion to amend the judgment. The court stated that it was "convinced that the result it reached with respect to mitigation of damages and recoverable costs is correct and will not award [Hidden Chutes] the full amount of damages sought at trial."

However, the court agreed that Hidden Chutes had recovered twice for the Protein Bar portion of the space in November 2013 and reduced the judgment accordingly.

¶ 26 Subsequently, Hidden Chutes appealed and Blick cross-appealed, though Blick later withdrew its cross-appeal.

¶ 27 II. ANALYSIS

¶ 28 On appeal, Hidden Chutes first contends that the court erred in finding that Hidden Chutes failed to mitigate damages. Hidden Chutes argues that it exercised reasonable business judgment in choosing to divide the space, but the court micromanaged and second-guessed the details of that choice. Hidden Chutes further asserts that the court's conclusion was based on a misunderstanding of the facts surrounding the relevant LOIs and the nature of the contacts with Home Run Inn. According to Hidden Chutes, all of the space had been otherwise accounted for by November 2013, and moreover, Home Run Inn did not extend a lease offer in November 2013.

¶ 29 The standard of review for an award of damages after a bench trial is whether the court's judgment is against the manifest weight of the evidence—that is, if the opposite conclusion is clear or where the trial court's findings are unreasonable, arbitrary, or not based on evidence. *1472 N. Milwaukee, Ltd. v. Feinerman*, 2013 IL App (1st) 121191, ¶ 13. "A judgment is not against the manifest weight of the evidence merely because there is sufficient evidence to support a contrary judgment." *Watkins v. American Service Insurance Co.*, 260 Ill. App. 3d 1054, 1062 (1994). Also, a damage award is not against the manifest weight of the evidence if there is an adequate basis in the record to support the trial court's determination of damages. *1472 N. Milwaukee, Ltd.*, 2013 IL App (1st) 121191, ¶ 13. We defer to the trial court as the finder of fact, and we may not substitute our judgment for that of the trial court about the

credibility of witnesses, the weight to be given to the evidence, or the inferences to be drawn. *In re D.F.*, 201 Ill. 2d 476, 498-99 (2002). Lastly, we view the evidence in the light most favorable to the appellee. *In re Marriage of Bates*, 212 Ill. 2d 489, 516 (2004).

¶ 30 A landlord has a statutory duty to "take reasonable measures to mitigate the damages recoverable against a defaulting lessee." 735 ILCS 5/9-213.1 (West 2012). The purpose of this statute is to "require landlords to make reasonable efforts to re-let the premises vacated by defaulting tenants rather than allowing property to stand vacant and collecting rent in the form of damages." *JMB Properties Urban Co. v. Paolucci*, 237 Ill. App. 3d 563, 568 (1992). Generally, the question of whether a landlord met its statutory duty to mitigate damages is a question of fact. *Danada Square, LLC v. KFC National Management Co.*, 392 Ill. App. 3d 598, 607 (2009). We note that mitigation concerns the measure of damages and not the legal right to recover damages. *St. George Chicago, Inc. v. George J. Murges & Associates, Ltd.*, 296 Ill. App. 3d 285, 293 (1998).

¶ 31 As for the burden of proof, Hidden Chutes incorrectly asserts that the defaulting tenant must prove that the landlord failed to mitigate. The first case to consider the burden of proof under the relevant statute, *Snyder v. Ambrose*, 266 Ill. App. 3d 163, 166 (1994), held that landlords have the burden to establish that they mitigated damages. The court reasoned that landlords are in the best position to prove that they complied with the duty to mitigate and that placing the burden of proof on tenants would undercut landlords' duty to mitigate damages by making it difficult for tenants to seek a remedy. *Id.* at 167 (citing Legislative Note, *Illinois Landlords' New Statutory Duty to Mitigate Damages: Ill Rev. Stat. Ch. 110, § 9-213.1*, 34 DePaul L. Rev. 1033, 1054 (1985)). This court and others have since followed *Snyder*. See *Danada Square, LLC*, 392 Ill. App. 3d at 608 (stating that the landlord bears the burden of

proving that it complied with the duty to mitigate); *St. George Chicago, Inc.*, 296 Ill. App. 3d at 293 (agreeing with *Snyder* that the landlord is in the best position to present evidence of reasonable efforts to mitigate and should therefore bear the burden of proof); *Manufacturers Life Insurance Co. (U.S.A.) v. Mascon Information Technologies Ltd.*, 270 F. Supp. 2d 1009, 1013 (N.D. Ill. 2003) (in a case that applied Illinois law, stating that the landlord has the burden of proving mitigation of damages). We follow *Snyder* and so Hidden Chutes bears the burden of proving it complied with its statutory duty to mitigate damages.

¶ 32 Further, Hidden Chutes has not cited any post-*Snyder* cases that involve a landlord's statutory duty to mitigate damages and state that the tenant has the burden of proof. The cases it cites either involve entirely different contexts or are landlord-tenant cases issued before *Snyder*. See *Pioneer Bank & Trust Co. v. Seiko Sporting Goods U.S.A. Co.*, 184 Ill. App. 3d 783, 790-91 (1989) (involving claim that party failed to mitigate damages incurred by failure to pay note due and owing as security for letter of credit); *Prater v. J.C. Penney Life Insurance Co.*, 155 Ill. App. 3d 696, 699-700 (1987) (explaining burden-shifting related to a life insurance policy issue); *Illiana Machine & Manufacturing Corp. v. Duo-Chrome Corp.*, 152 Ill. App. 3d 764, 765, 769 (1987) (involving claim that party failed to mitigate damages arising from breach of contract for alleged defective performance of various items); *In re Custody of Anderson*, 145 Ill. App. 3d 746, 750 (1986) (explaining burden-shifting under a section of the Illinois Marriage and Dissolution of Marriage Act); *American National Bank & Trust Co. of Chicago v. Hoyne Industries, Inc.*, 966 F.2d 1456 (7th Cir. 1992) (unpublished landlord-tenant decision pre-*Snyder*). Hidden Chutes has not provided a reason for us to abandon *Snyder* and so, as stated above, Hidden Chutes bears the burden of proving it complied with the statutory duty to mitigate.

¶ 33 Next, we consider whether the trial court correctly found that Hidden Chutes failed to mitigate after November 2013 because Hidden Chutes pursued a three-tenant plan instead of a two-tenant plan that would have consisted of Home Run Inn and Protein Bar. Our review hinges on the leasing landscape in November 2013. Hidden Chutes claims that all of the space was accounted for because 123 Sushi, Native Foods, and Protein Bar all had LOIs in November. Hidden Chutes also states that Home Run Inn never tendered a lease in November 2013 and that the court made a mistake in finding otherwise. Our review of the record indicates that the situation was not as fixed as Hidden Chutes claims and the court could conclude that Home Run Inn indeed would have signed a lease.

¶ 34 We first consider the status of the three supposedly committed tenants: 123 Sushi, Native Foods, and Protein Bar. As for 123 Sushi, the record contains an LOI that is dated November 12, 2013, and appears to be in draft form, with proposed changes throughout. The commission agreement with 123 Sushi's broker is unsigned and dated November 25, 2013. The Native Foods LOI was signed by a Native Foods representative on November 25, 2013, and was signed by Martin on November 26, 2013. The Protein Bar LOI was dated November 26, 2013, and was signed by a Protein Bar representative on December 2, 2013. Meanwhile, an email from Home Run Inn's broker on the morning of November 26, 2013, entered the picture. The email stated that the deal was "very important to the company" and offered scenarios for a 5,093-square-foot space and 3,250-square-foot space, in order of preference. The email also stated that if either structure could be made to work, Home Run Inn was "ready to sign and put this one to bed." Based on the Home Run Inn email's strong language and stated willingness to take one of two spaces, the court could conclude that Home Run Inn would have signed a lease. Thus, the court

was not mistaken that Home Run Inn was willing to sign a lease, through we acknowledge that there was no written, formal lease in play.

¶ 35 The question, then, is the state of 123 Sushi, Native Foods, and Protein Bar when Home Run Inn voiced its willingness to do a deal. Based on the LOIs and testimony at trial, there is evidence that there was solid interest from three tenants for a three-tenant plan at the time that Martin received the email from Home Run Inn's broker. However, there is also evidence that none of the other three potential tenants had signed LOIs. The 123 Sushi LOI was in draft form. The Native Foods LOI was signed by Martin on November 26, but it is unknown at what time she signed it. Martin's email to Hitpas an hour after the Home Run Inn email suggests that Hidden Chutes was still weighing its options that morning. The Protein Bar LOI was only dated for November 26. Thus, there is evidence that negotiations were still in flux and that Hidden Chutes could have committed to Home Run Inn, leaving Protein Bar to take the 2,189-square-foot space in a two-tenant plan. Indeed, Martin testified that there was no reason why Protein Bar could not have taken a 2,189-square-foot space in a two-tenant plan.

¶ 36 The problem for Hidden Chutes is that its leasing strategy was aimed at maximizing value rather than mitigating damages. Martin testified that she went about re-letting the space in the same way she would for any other space. She acknowledged that the effective rent per square foot was higher in a three-tenant plan than in a two-tenant plan. Further, after Home Run Inn's email, Martin reported to Hitpas that using Native Foods in a three-tenant plan was the strongest financial decision. What Hidden Chutes should have recognized is that mitigating damages is a different task than leasing space under other circumstances. When re-letting to minimize damages, "a landlord does not have the same freedom of choice that is available to him when he selects a tenant for his own account." *Kellman v. Radioshack Corp.*, 315 F.3d 731, 741 (7th Cir.

2002) (citing Milton R. Friedman, Friedman on Leases, § 16.303 (4th ed. 1997)). There is evidence that Hidden Chutes could have filled all of the space in November 2013 based on the state of negotiations with Protein Bar and Home Run Inn, but Hidden Chutes did not pursue that option because a three-tenant plan was more lucrative. We will not substitute our judgment for that of the trial court where the trial court's determination is supported by sufficient evidence in the record. *MXL Industries, Inc. v. Mulder*, 252 Ill. App. 3d 18, 31 (1993). Thus, we affirm the trial court's decision that Hidden Chutes failed to mitigate damages in November 2013.

¶ 37 Further, we disagree that the trial court micromanaged Hidden Chutes's decision-making process and allowed Blick to blame Hidden Chutes no matter what Hidden Chutes did. Hidden Chutes cites a statement from a case involving environmental clean-up obligations that "[t]he duty to mitigate will not be invoked as grounds for a hypercritical examination of a plaintiff's conduct." *Amalgamated Bank of Chicago v. Kalmus & Associates, Inc.*, 318 Ill. App. 3d 648, 660 (2000). We disagree that the trial court micromanaged Hidden Chutes's process for re-letting the space. The trial court agreed with Hidden Chutes's decision to subdivide, but concluded that its efforts to fill the space could have been complete in November 2013. The evidence supports the trial court's conclusion. Further, it is speculative to presume that Blick would have complained if Hidden Chutes had acted differently.

¶ 38 Next, Hidden Chutes contends that even if it could only recover lost rent for the space leased to Protein Bar, the court's lost rent allocation was incorrect. Hidden Chutes argues that the court erred when it cut off lost rent for the Protein Bar space as of April 2014, the date of Protein Bar's lease. According to Hidden Chutes, the court ignored that Protein Bar was not obligated to pay rent for a period of time, and so Hidden Chutes could recover rent until Protein Bar started paying in February 2015. Blick responds that the trial court could reasonably conclude that any

negotiations between Hidden Chutes and Protein Bar as to when rent payments would begin was part of their own arrangement.

¶ 39 We find that the trial court's order on this point must be clarified. The court's order that asked for posttrial briefs listed only two damage periods: July 2013 through November 2013, and November 2013 through April 2014. In its posttrial brief, Hidden Chutes asserted that Blick's lease obligations continued until the new tenants started paying. The court's subsequent order stated that the damage award would be separated into three periods, but then only addressed two periods. The court also credited Blick with the rent that Protein Bar paid, but did not address the gap between when the lease was signed and when Protein Bar started paying rent. Hidden Chutes raised this issue in its motion to reconsider and Blick did not respond to Hidden Chutes's argument. The court denied Hidden Chutes's motion to reconsider without specifically addressing the gap between when Protein Bar signed the lease and when it started paying rent.

¶ 40 Based on that history, we cannot discern whether the court meant to deny rent between April 2014 and February 2015 or whether denying rent was an oversight. Particularly troubling is the inconsistency in the court's language about whether there were two or three relevant periods, coupled with the court's failure to address the matter after Hidden Chutes raised it in a motion to reconsider. Moreover, there are potential reasons for either granting or denying lost rent for that time. Compare *Northwest Commerce Bank v. Continental Data Forms, Inc.*, 233 Ill. App. 3d 124, 130-31 (1992) (vacating tenant not granted rent set-off where four-month rent concession was necessary to persuade successor tenant to sign new lease), with *Pioneer Trust & Savings Bank*, 96 Ill. App. 3d at 346-47 (because delay in right to collect rent was due to landlords' unreasonable length of time to complete remodeling, trial court properly disallowed this expense in computing damages). Because we cannot determine whether the trial court intentionally

denied lost rent for the Protein Bar space or whether it was an oversight, we remand so the court can clarify its ruling.

¶ 41 Lastly, we consider Hidden Chutes's contention that it should have been awarded the costs of reconfiguring the space for three tenants, which totaled $710,842.32. Hidden Chutes states that the court approved of Hidden Chutes's decision to divide the space so that it was attractive to prospective tenants. Hidden Chutes further states that this decision allowed it to obtain tenants in just months and reduce Blick's rent obligation. Hidden Chutes presents two grounds for holding Blick liable for paying the construction costs: the plain language of Blick's lease and the common law of damages in lease default scenarios.

¶ 42 Turning to the lease, section 16.2(B) states in part:

> "If Landlord elects to terminate Tenant's right to possession under this Lease, but not to terminate this Lease, Landlord may, relet the Leased Premises (or any part thereof) for the account of Tenant as such rentals and upon such terms and conditions as Landlord shall deem appropriate, and to the extent Landlord receives the rents therefor, Landlord shall apply the same first to the payment of such expenses as Landlord may have incurred in recovering possession of the Leased Premises *** and for putting the same into good order and condition and preparing or altering the same for re-rental, and any other expenses, commissions and charges paid, assumed or incurred by or on behalf of Landlord in connection with the reletting of the Leased Premises, and then to the fulfillment of the covenants of Tenant under this Lease. ***"

¶ 43 Hidden Chutes points to the language that holds Blick responsible for the costs of "altering the same for re-rental." According to Hidden Chutes, the lease did not limit damages to

the costs of repairs needed to return the property to its original condition, but rather, protected Hidden Chutes from costs incurred to alter the property to meet replacement tenant demands when the existing tenant defaulted. Hidden Chutes further asserts that it can recover even if the work also increased the property's value or was a capital improvement. According to Hidden Chutes, it needs to show that it spent the funds to re-let after a default, which the court found that Hidden Chutes had done here.

¶ 44 Because a lease is a contract, we apply contractual rules of interpretaion. *Midway Park Saver v. Sarco Putty Co.*, 2012 IL App (1st) 110849, ¶ 13. In interpreting a contract, "the primary goal is to give effect to the parties' intent by interpreting the contract as a whole and applying the plain and ordinary meaning to unambiguous terms." *Id*. A contract term is ambiguous when the language used has more than one reasonable interpretation, and the parties' disagreement over the meaning of a term does not, by itself, make the term ambiguous. *Storino, Ramello & Durkin v. Rackow*, 2015 IL App (1st) 142961, ¶ 18. The interpretation of a contract is a question of law subject to *de novo* review. *Id*.

¶ 45 A plain reading of the language in section 16.2(B) of the lease indicates that this provision does not include the costs of reconfiguring the space as Hidden Chutes did. The provision states that the landlord can recover costs "for putting the [premises] into good order and condition and preparing or altering the same for re-rental, and any other expenses, commissions and charges paid, assumed or incurred by or on behalf of Landlord in connection with the re-letting of the Leased Premises." The plain language of the provision covers the costs needed for the property to be re-leased. Here, the court agreed that Hidden Chutes had to divide the space due to lack of interest in the entire space, but found that Hidden Chutes did not have to create three spaces. The court further found that Hidden Chutes's decision to pursue three tenants

was intended to maximize the overall value of the property. As stated above, there was support in the record for that finding, and so we defer to it. See *MXL Industries, Inc.*, 252 Ill. App. 3d at 31 (reviewing court will not invade province of trier of fact where trier of fact's determination is otherwise supported by sufficient evidence in the record). Thus, creating three spaces was not necessary to re-let the property and the construction costs are not covered by the lease.

¶ 46 Further, an interpretation that allows the recovery of costs spent after a tenant defaults, but not necessarily needed to re-let, would risk turning section 16.2(B) of the lease into a blank check. To the extent that a contract is susceptible to two interpretations, one of which is fair, customary, and such as prudent people would naturally execute, and the other makes it inequitable, unusual, or such as reasonable persons would not be likely to enter into, the interpretation that makes a rational and probable agreement is preferred. *In re Marriage of Sweders*, 296 Ill. App. 3d 919, 922-23 (1998). It is unreasonable to believe that the parties intended that Blick would be responsible for work that exceeded what was needed to re-let the property. Hidden Chutes cannot recover under the lease for the costs of configuring the premises into three spaces.

¶ 47 Hidden Chutes further contends that even without the re-letting provision, persuasive authority allows Hidden Chutes to recover its construction costs. Hidden Chutes asserts that the court misconstrued the holding of *Pioneer Trust & Savings Bank*, 96 Ill. App. 3d 339, and relies on three other cases to assert that renovations done to attract replacement tenants are recoverable damages caused by the departing tenant's breach: *Reid v. Mutual of Omaha Insurance Co.*, 776 P.2d 896 (Utah 1989), *Ruston v. Centennial Real Estate & Investment Co.*, 445 P.2d 64 (Colo. 1968), and *In re Handy Andy Home Improvement Centers, Inc.*, 1998 WL 603252 (Bankr. N.D. Ill. 1998).

¶ 48 Hidden Chutes agrees that much of the construction work was a capital improvement. We note that few Illinois cases have considered whether a landlord can recover for capital improvements, and so where helpful we have looked to other jurisdictions for guidance. See *Allstate Insurance Co. v. Lane*, 345 Ill. App. 3d 547, 552 (2003) (stating that a court can look to other jurisdictions only in absence of Illinois authority, but noting that out-of-state citations helped illustrate relevant points). As background, capital improvements include changes that increase the value of the property. See *Northwest Commerce Bank*, 233 Ill. App. 3d at 126; *Pioneer Trust & Savings Bank*, 96 Ill. App. 3d at 346. It has also been noted that capital improvements are of a "substantial and permanent character" (*C.D. Stimson Co. v. Porter*, 195 F.2d 410, 414 (10th Cir. 1952)).

¶ 49 We first examine Illinois cases that address when a landlord can recover construction costs after a tenant leaves. In *Northwest Commerce Bank*, 233 Ill. App. 3d at 126-27, the court stated that "[a] vacating tenant has no duty to pay for capital improvements which add value to the property," but if the condition of the premises at the end of a tenancy is not the same as at the beginning, the landlord may hold the tenant liable for costs of returning the premises to a condition acceptable for rental. In *Pioneer Trust & Savings Bank*, 96 Ill. App. 3d at 346, the landlords could not recover costs for completing remodeling that was required by the mitigating tenant. The court found that the trial court could have properly concluded that the costs were not an expense, but rather were "a capital improvement which would increase the value of the premises." *Id.* at 346.

¶ 50 *Northwest Commerce Bank* and *Pioneer Trust & Savings Bank* suggest that construction costs are recoverable in certain circumstances—for example, if the costs were an "expense" (*Pioneer Trust & Savings Bank*, 96 Ill. App. 3d at 346) or "to return the premises to a condition

acceptable for rental" (*Northwest Commerce Bank*, 233 Ill. App. 3d at 127). Of note, it appears that recoverable costs could include work that is capital in nature, if necessary to re-let. In *Northwest Commerce Bank*, the court allowed expenses for demolition and rebuilding work, which included demolishing and removing interior walls and ceilings and the related replacement of sprinkler lines and electrical equipment. *Id*. at 126-27.

¶ 51 Other jurisdictions allow landlords to recover construction costs if the work was necessary to re-let. See *In re Andover Togs*, 231 B.R. 521, 537 (Bankr. S.D.N.Y. 1999) (landlord could include in its computation of damages the capital costs that it necessarily expended to obtain successor tenants, but not those that represented long term capital improvements that yield a betterment to the leasehold); *In re Stewart's Properties, Inc.*, 41 B.R. 353, 356 (Bankr. D. Hawai'i 1984) (lessors can recover expenses that were reasonably and necessarily incurred to obtain a new tenant, but may not recover expenses for long-term capital improvements where such expenditures ultimately benefitted themselves as lessors); *Matter of Parkview-Gem, Inc. v. Corondolet Realty Trust*, 465 F. Supp. 629, 638 (W.D. Mo. 1979) (where landlord sought to recover remodeling expenses incurred in obtaining new tenants, landlord could recover reasonable expenses incurred in mitigating damages but not for expenses incurred in making long-term capital improvements because those expenditures would ultimately benefit the landlord); *C.D. Stimson v. Porter*, 195 F.2d 410, 414 (10th Cir. 1952) (landlord could recover expenses reasonably necessary to obtain a tenant and mitigate damages, but not for dividing premises into two units, putting in restrooms, and other major alterations where changes were of substantial and permanent character and benefitted the landlord).

¶ 52 Hidden Chutes's cited cases are consistent with the cases cited above. In *Reid*, 776 P.2d at 907, the court stated that costs reasonably incurred to ready the property and re-let or attempt

to re-let can be recovered, which can include costs of repairs or alterations of the premises reasonably necessary to successfully re-let the property. In *In re Handy Andy Home Improvement Centers, Inc.*, 1998 WL 603252, *5, which we note is unpublished, the court stated that "[e]xpenses are not recoverable where they represent long term capital improvements which yield a betterment to the leasehold," but landlords may "recover expenses reasonably incurred to mitigate." In that case, the expenses at issue were capital improvements, but it was undisputed that that the property could not have been re-let without them. *Id.* Significantly, the court in *Handy Andy* did not have to defer to a previous court's findings of fact. As for *Ruston*, 445 P.2d at 66, which was resolved on the lease, the case underscores the trial court's role in determining whether costs are recoverable. There, the court allowed the landlord's costs for alterations and repairs because the trial court had found that the landlord's conduct was consistent with the lease, which allowed the landlord to make any repairs, changes, alterations, or additions necessary or desirable for re-letting. *Id.* Here, as explained above, the trial court found that the construction work was not necessary to re-let, a finding to which we defer and that places Hidden Chutes's actions outside the terms of the lease.

¶ 53 Thus, Hidden Chutes can recover for construction costs that were needed to mitigate. However, whether those costs were needed was a question for the trial court to resolve. See *Northwest Commerce Bank*, 233 Ill. App. 3d at 127 (using the manifest weight of evidence standard when reviewing the trial court's conclusion that demolition and rebuilding was the least expensive means of returning the property to a condition acceptable for rental); *Pioneer Trust & Savings Bank*, 96 Ill. App. 3d at 345-46 (stating that fixing amount of damages is "preeminently the function of the fact finder" and noting that trial court saw the plans for the remodeling and heard testimony about the type of work done). The trial court found that Hidden Chutes divided

the space to maximize the overall value of the property and the construction costs were not necessary to return the property to a leasable condition. This finding was supported by the evidence. Blick's expert testified that the construction work was not needed to re-let the property and the improvements added value and allowed the property to be rented at a substantially higher rate. Further, and as stated above, Hidden Chutes could have filled the space with two tenants instead of three. The trial court's conclusion that Hidden Chutes could not recover the costs of creating three spaces was not against the manifest weight of the evidence.

¶ 54 III. CONCLUSION

¶ 55 For the foregoing reasons, the judgment of the trial court is affirmed in part and remanded to the trial court for clarification on whether Hidden Chutes can recover lost rent for the Protein Bar space between April 2014 and February 2015.

¶ 56 Affirmed and remanded with directions.