IN THE SUPREME COURT OF GUAM

E.C. DEVELOPMENT, LTD.,
Plaintiff-Appellee,

vs.

GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTIST dba GUAM SEVENTH-DAY ADVENTIST CLINIC,
Defendant-Appellant.

Supreme Court Case No. CVA03-019
Superior Court Case No. CV0290-02

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on June 23, 2004
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; ROBERT J. TORRES, Associate Justice.

TORRES, J.:

[1] Defendant-Appellant General Conference Corporation of Seventh-Day Adventist dba Seventh-Day Adventist Clinic ("SDA") appeals from a Superior Court Decision and Order in a breach of lease agreement dispute between SDA as tenant and Plaintiff-Appellee E.C. Development ("EC") as landlord, involving the lease of two units in a commercial complex in Dededo, Guam. We hold that the statutory presumption found in Title 18 Guam Code Annotated § 51105 applies to both leases; however, the presumption was rebutted as to one lease. The trial court's decision is affirmed in part and reversed in part.

I.

[2] The dispute arises from the alleged breach by SDA of nearly identical lease agreements for two units, Suite 109 and Suite 110, in the Palm Village commercial complex, which were to be used for a rehabilitation clinic, physical therapy clinic, health education and primary care services.

[3] The lease for Suite 109 was executed on September 11, 1996, and the initial term was to expire on November 30, 1999. The length of the lease was described as follows:

> 1.08. Lease Term [and Option]: Initial **three (3)** year (approximate, due to undetermined move in date) Lease Term [and **two (2)** option(s) to extend the Lease Term for an additional **three (3)** year(s) each (the "option period(s)")].

Appellant's Excerpts of Record ("ER"), p. 9 (Suite 109 lease agreement). The lease agreement established a schedule wherein the fixed rent, including the monthly rent and Common Area

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Maintenance ("CAM") charge, would increase after the first three-year term.[1]

[4] The lease for Suite 110 was executed on March 29, 1996, and the initial term was to expire on April 30, 1999. The length of lease for Suite 110 was described as:

> 1.08. Lease Term [and Option]: Initial **three (3)** year Lease Term [and **two (2)** option(s) to extend the Lease Term for an additional **three (3)** year(s) each (the "option period(s)")].

ER, p. 49 (Suite 110 lease agreement). The lease agreement established a schedule wherein the fixed rent, including the monthly rent and Common Area Maintenance ("CAM") charge, would increase every year.[2]

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[1] Suite 109's rent and CAM schedule in § 1.09 provided:

Year	Square feet (SF)	Monthly rent	CAM/SF	CAM charge
1	2.00	$ 3,354.00	.30	$ 503.10
2	2.00	$ 3,354.00	.30	$ 503.10
3	2.00	$ 3,354.00	.30	$ 503.10
4	2.19	$ 3,672.63	.33	$ 553.41
5	2.25	$ 3,773.25	.34	$ 570.10
6	2.36	$ 3,957.72	.36	$ 603.72
7	2.48	$ 4,158.96	.37	$ 620.49
8	2.61	$ 4,376.97	.39	$ 654.03
9	2.74	$ 4,594.98	.41	$ 687.57

ER, p. 9 (Suite 109 lease agreement).

[2] Section 1.09 of the lease agreement for Suite 110 provided as follows:

Year	Square feet (SF)	Monthly rent	CAM/SF	CAM charge
1	2.00	$ 7,200.00	.30	$ 1,080.00
2	2.06	$ 7,416.00	.31	$ 1,116.00
3	2.12	$ 7,638.48	.32	$ 1,152.00
4	2.19	$ 7,867.63	.33	$ 1,188.00
5	2.25	$ 8,103.66	.34	$ 1,224.00
6	2.36	$ 8,508.85	.36	$ 1,296.00
7	2.48	$ 8,934.29	.37	$ 1,332.00
8	2.61	$ 9,381.00	.39	$ 1,404.00
9	2.74	$9,850.05	.41	$ 1,476.00

ER, p. 49 (Suite 110 lease agreement).

[5] Other pertinent provisions in both of the leases addressed "holdover" and "waiver" as follows:

> 25.01 Holding Over. If Tenant should remain in possession of the Premises after the expiration of the Lease Term with the express written consent of Landlord and without executing a new lease, then such holding over shall be construed as a tenancy from month-to-month, subject to all conditions, provisions and obligations of this Lease insofar as the same are applicable to a month-to-month tenancy, except that the Fixed Rent shall be an amount equal to one hundred fifty percent (150%) of the adjusted Fixed Rent that was applicable at the expiration of the Lease.

ER, p. 35 (Suite 109 lease agreement); ER, p. 75 (Suite 110 lease agreement).

> 28.01 Waivers. One or more waivers by Landlord of any covenant or condition contained in this Lease of any breach or default by Tenant shall not be construed as a waiver of a subsequent breach or default. No waiver shall be effective unless it is in writing and signed by Landlord.

ER, p. 38 (Suite 109 lease agreement); ER, p. 78 (Suite 110 lease agreement).

[6] After executing each lease, SDA took possession of the units. For Suite 109, EC billed and SDA paid "a consistent rental amount of **$3,354.00-rent** and $503.10-common area [charge] . . . . Thus, Defendant paid the same amount of rent . . . for a period of five years and four months, running from December, 1999 to Defendant's termination of the lease on March 15, 2002." ER, p. 116 (Decision and Order, Aug. 11, 2003).[3]

[7] For Suite 110, EC billed and SDA paid the amounts in accordance with § 1.09 of the lease agreement for the first five years. For the initial three-year lease period this amount was rent of $7,200 and CAM charge of $1,080 for Year 1, rent of $7,416 and CAM charge of $1,116 for Year 2, and rent of $7,638.48 and CAM charge of $1,152 for Year 3. From May 24, 1999 to April 24, 2000, EC billed and SDA paid rent of $7,867.63 and CAM charge of $ 1,188.00, as required by the lease for Year 4. From May 23, 2000 to April 19, 2001, EC billed and SDA paid rent of $8,103.66 and CAM charge of $1,224.00, as required by the lease for Year 5. From May 22, 2001 to December 20, 2001, EC billed and SDA paid the same monthly amount as it had during Year 5 and not the monthly amount required under the lease during Year 6. These monthly amounts were apparently also paid for January 2002 and February 2002. It is undisputed that SDA "never sent a formal letter to [EC] exercising its option to renew." ER, p. 114 (Decision and Order, Aug. 11, 2003).

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[3] The parties agree that sometime during the early months of 1999, they began discussing a third lease for an additional unit in the Palm Village complex and rent reductions on the existing leases. However, the parties never reached an agreement for a new lease.

[8] On or about February 4, 2002, SDA Administrator Michael Mahoney sent a letter to Leonard Calvo, general manager of EC, stating that SDA was terminating its leases for both suites effective March 15, 2002. EC filed a civil action for breach of the lease agreements on March 11, 2002, seeking damages for the rent due on both suites, for attorneys' fees and costs. SDA filed its answer, raising several affirmative defenses and seeking dismissal of the complaint. SDA subsequently filed a motion for summary judgment, and EC filed an opposition and a cross-motion for summary judgment. At the hearing on the summary judgment motions, EC advised the trial court that it sought to amend its pleadings. EC later filed its motion to amend its pleadings, which SDA opposed. The trial court held a hearing on the motion to amend, and deferred ruling on the summary judgment motions in light of the motion to amend. In a January 14, 2003 Decision and Order, the trial court granted the motion to amend, and EC subsequently filed its amended complaint on January 28, 2003. SDA filed its answer to the amended complaint on February 3, 2003. The record does not indicate that the trial court ever filed a Decision and Order with regard to the outstanding summary judgment motions. Instead, the case proceeded to trial on May 13, 2003.

[9] On August 11, 2003, the court issued its post-trial Decision and Order, and found that SDA was not a holdover tenant in accordance with the lease agreements' terms, because, *inter alia,* EC had not given express written consent to the holdover as required by law. The court further found that SDA, by its actions, had exercised its options to renew each of the lease agreements for an additional three-year period, and breached the terms of the leases by vacating the premises prior to the expiration of the extended periods. The trial court further decided EC had not waived its right to seek the Fixed Rent stated in the lease agreements and that EC had mitigated its damages as required by law. Finally, the court concluded EC would be entitled to damages in the amount of $51,499.71 plus interest of 6% per annum commencing December 1, 2002 for Suite 109, and the sum of $19,717.78 plus interest of 6% per annum commencing May 1, 2002 for Suite 110. Judgment was entered on September 17, 2003.

[10] The Notice of Appeal was timely filed on September 22, 2003.

II.

[11] This is an appeal from a final judgment, over which this court has jurisdiction. Title 7 GCA §§ 3107 and 3108(a) (West, WESTLAW through Guam Pub. L. 28-027 (Apr. 22, 2005)); 48 U.S.C.

§ 1424-1(a)(2) (West, WESTLAW through Pub. L. 109-20 (2005)).

[12] Findings of fact after a bench trial are reviewed for clear error. *Yang v. Hong*, 1998 Guam 9, ¶ 4. Conclusions of law are reviewed *de novo*. *Town House Dep't Stores, Inc. v. Hi Sup Ahn*, 2000 Guam 32, ¶ 13. Issues of statutory interpretation are reviewed *de novo*. *See Carlson v. Guam Tel. Auth.*, 2002 Guam 15, ¶ 16.

III.

A. Title 18 GCA § 51105

[13] The threshold issue we must address is whether Title 18 GCA § 51105 applies to commercial leases. Section 51105 states:

> **Renewal, continued possession.** If a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month when the rent is payable monthly, not in any case one year.

Title 18 GCA § 51105 (West, WESTLAW through Guam Pub. L. 28-027 (Apr. 22, 2005)).[4] Applying the statutory presumption would necessarily lead to the conclusion, absent evidence to rebut the presumption, that the options to extend the lease had not been exercised. Therefore, SDA would not owe additional rent for the remainder of the option term. SDA argues that 18 GCA § 51105 applies to commercial leases, and that the trial court erred in concluding that this provision did not apply to commercial leases. EC counters that the court properly refused to apply the statutory presumption, and we should uphold the trial court. Resolution of this issue, in our view, has a determinative effect on the remaining issues on appeal.

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[4] The source of 18 GCA § 51105 is Guam Civil Code § 1945. *See* Title 18 GCA § 51105 (WEST, WESTLAW through Guam Pub. L. 28-027 (Apr. 22, 2005)). However, Civil Code § 1945 states:

> If a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month when the rent is payable monthly, nor in any case one year.

Guam Civil Code § 1945 (1970). A typographical error apparently occurred during codification, as the last phrase of Civil Code § 1945 states "*nor* in any case one year." (Emphasis added). In contrast, the codified version, 18 GCA § 51105, states "*not* in any case one year." (Emphasis added). This typographical error does not change the substance of the provision.

[14] We recognize that "[i]n cases involving statutory construction, the plain language of a statute must be the starting point." *Pangelinan v. Gutierrez*, 2000 Guam 11, ¶ 23. Nevertheless, we have further stated that we may refer "to the prevailing interpretation of other statutes that share the same language and either have the same general purpose or deal with the same general subject as the statute under consideration." *Aguon v. Gutierrez*, 2002 Guam 14, ¶ 11 (quoting *de los Santos v. Immigration & Naturalization Serv.*, 525 F. Supp. 655, 666 (S.D.N.Y. 1981)).

[15] Title 18 GCA § 51105 is derived from and is virtually identical to § 1945 of the California Civil Code.[5] California courts have not limited application of § 1945 to residential property. *See Worthington v. Kaiser Found. Health Plan, Inc.*, 87 Cal. Rptr. 272, 273 (Ct. App. 1970) (applying § 1945 to lease of property "to be used for the operation of a medical clinic, doctors' offices, clinical laboratory, optical laboratory, pharmacy"); *Miller v. Stults*, 300 P.2d 312, 314-16 (Cal. Dist. Ct. App. 1956) (applying § 1945 to agricultural land); *Hagenbuch v. Kosky*, 298 P.2d 875 (Cal. Dist. Ct. App. 1956) (applying § 1945 to 320-acre ranch property); *Aaker v. Smith*, 196 P.2d 150 (Cal. Dist. Ct. App. 1948) (applying § 1945 to lease property for a cocktail lounge); *Knox v. Wolfe*, 167 P.2d 3 (Cal. Dist. Ct. App. 1946) (applying § 1945 to a lease of a cocktail and restaurant business); *Stetson v. Orland Oil Syndicate Ltd.*, 108 P.2d 463, 464 (Cal. Dist. Ct. App. 1940) (applying § 1945 to property to be used for "the sole and only purpose of mining and operating for oil and gas and of laying pipe lines and of building tanks, power stations and structures thereon to produce, save and take care of said products"). Moreover, because 18 GCA § 51105 is identical to and derived from § 1945 of the California Civil Code, the California courts' interpretation of § 1945 is persuasive authority, unless there is a "compelling reason to deviate from that jurisdiction's interpretation." *Fajardo v. Liberty House Guam*, 2000 Guam 4, ¶ 17. There is no "compelling reason to deviate" from the rule of California courts that apply the statutory presumption to leases of commercial property. *Id.*

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[5] California Civil Code § 1945 is identical to Guam Civil Code § 1945, the source of 18 GCA § 51105. California's § 1945 states:

> If a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month when the rent is payable monthly, nor in any case one year.

CALIFORNIA CIVIL CODE § 1945 (West, WESTLAW through Ch. 33 2005 Reg. Sess.).

[16] In addition, nothing in the "clear legislative history" of 18 GCA § 51105 reveals that anything other than the plain meaning should prevail. *See Sumitomo Constr. Co. v. Gov't of Guam*, 2001 Guam 23, ¶ 17 ("Absent clear legislative intent to the contrary, the plain meaning prevails.") Specifically, the plain words of 18 GCA § 51105 do not limit its application solely to residential property. Furthermore, we have stated that "the language of the statute cannot be read in isolation, and must be examined within its context. . . . [which] includes looking at other provisions of the same statute and other related statutes." *Aguon*, 2002 Guam at 14 at ¶ 9 (citations omitted). In analyzing 18 GCA § 51105, the trial court looked to other provisions within Chapter 51 of Title 18, including § 51101, *Lessor to make dwelling habitable*, § 51104, *Hiring, indefinite term*, and § 51111, *Oral Leases; limitation on raising rents. See generally* 18 GCA, chapter 51 (West, WESTLAW through Guam Pub. L. 28-027 (Apr. 22, 2005)).

[17] The court below concluded that these provisions within Chapter 51 referred only to residential leases; therefore, it was doubtful § 51105 was intended to apply to commercial leases. However, nothing in the other statutory provisions of Chapter 51 (specifically §§ 51102, 51106, 51107, or 51109) limit their application to residential leases. In fact, the trial court neglected to mention Title 18 GCA § 51103 which expressly pertains to real property "other than lodgings and dwelling houses." Title 18 GCA § 51103 (West, WESTLAW through Guam Pub. L. 28-027 (Apr. 22, 2005)). There is, in short, no basis for the trial court's view that, because certain provisions within Chapter 51 are limited to residential leases, then § 51105 should likewise be limited. Nothing in Chapter 51 limits all the provisions of Chapter 51 solely to residential leases, and we are reluctant to find that such a limitation exists. The trial court's apparent limitation of 18 GCA § 51105 to residential leases with no legal basis creates "the definite and firm conviction that the court below committed a mistake." *Yang*, 1998 Guam 9 at ¶ 7.[6] The trial court clearly erred in finding that 18 GCA § 51105 was limited to residential leases; we hold that § 51105 applies to commercial leases.

[18] Having established that 18 GCA § 51105 applies to commercial leases, we must now examine the leases in question. Although the trial court adopted the same analysis and reached the

[6] As discussed *infra*, even though the trial court stated 18 GCA § 51105 did not apply to commercial leases, the trial court did analyze whether the circumstances set forth in 18 GCA § 51105 existed. It is unclear whether the court's decision that 51105 was based solely on a statutory interpretation or after a factual determination. While this distinction may be important for our standard of review in most cases, the trial court here erred in both its statutory and factual analyses.

same conclusion for both leases, the parties' conduct, including payment and acceptance of rent during the course of the performance of leases, reveals that the parties did not treat the leases the same way. The clearest way to analyze the parties' performance is to consider each lease separately.[7]

B. Suite 109

[19] Even though the trial court found it doubtful that 18 GCA § 51105 pertains to commercial leases, the court nonetheless examined whether the presumption of § 51105 applied to the lease for Suite 109. The trial court used the plain words of 18 GCA § 51105 and employed the following two-part test: "1. The Tenant must continue to occupy the premises after expiration of the hiring;" and "2. The Lessor accepts rent from the Tenant." ER, p. 119 (Decision and Order, Aug. 11, 2003). The court further stated that "[w]hen both conditions are found to exist, **the parties are presumed to have renewed the hiring** on the same terms and for the same time . . . ." ER, p. 119 (Decision and Order, Aug. 11, 2003). While we agree with the use of this test, which essentially adopts the plain words of 18 GCA § 51105, we are skeptical of the trial court's application of the test to the lease for Suite 109.

[20] The trial court determined that the first factor was not met, because "the present case involves a lease term of nine years with three [three-year] terms . . . ." ER, p. 119 (Decision and Order, Aug. 11, 2003). We disagree with this interpretation. The lease agreement states specifically that: "1.08. Lease Term [and Option]: Initial **three (3)** year (approximate, due to undetermined move in date) Lease Term [and **two (2)** option(s) to extend the Lease Term for an additional **three (3)** year(s) each (the "option period(s)")]." ER, p. 9 (Suite 109 lease agreement). Moreover, the agreement states: "1.07. Expiration Date: 11:59 p.m. on **30 November, 1999.**" ER, p. 8 (Suite 109 lease agreement).

[21] Here, the parties do not dispute that SDA remained in Suite 109 after the initial lease term had expired on December 1, 1999. Therefore, the first factor, that the tenant occupied the premises after expiration of the lease term, is satisfied.

[22] The trial court concluded that the second factor was not met, because this was not a case "in which the Landlord accepted rent from the Tenant but where a Tenant paid rent pursuant to an invoice received from the Landlord." ER, p. 119 (Decision and Order, Aug. 11, 2003). We cannot

[7] As EC's mitigation efforts for both leases were the same, the leases need not be considered separately for the mitigation issue.

uphold the trial court's conclusion that rent was not "accepted" by EC, simply because the rental payments were made pursuant to receiving a bill. Clearly, EC accepted the rental payments that had been tendered by SDA. Therefore, the second factor, the landlord's acceptance of rent from the tenant, is satisfied and the trial court erred in holding otherwise.

[23] Having concluded that the 18 GCA § 51105 factors existed concerning Suite 109, we still must determine the nature of the parties' relationship after the initial lease term expired on November 30, 1999. Specifically, we must review the nature of the tenancy from December 1, 1999 until SDA terminated the lease in order to determine how the continuing tenancy was controlled by the written lease terms and whether SDA validly terminated the lease.

1. Continuing Tenancy Under the Statutory Presumption

[24] As a general rule, the nature of the continuing tenancy under § 1945 of the California Civil Code is viewed as simply an extension of the former tenancy, except for the term of the tenancy. The court in *Knox v. Wolfe* explained the extension theory as follows:

> When a tenant under a lease remains in possession of the leased premises with the permission of the lessor from month to month after the term expires, a new tenancy is not created but the original tenancy is deemed to have been extended; and where a lease gives an option to the lessee "to renew" the lease for a specified term without requiring the execution of a new lease, the extension is a continuation of the tenancy under the original lease.

Knox, 167 P.2d 3, 8 (Cal. Dist. Ct. App. 1946) (citation omitted).[8] Under the "extension" theory, the parties would merely continue the original tenancy, and thus, the terms of the post-expiration period would be controlled by the lease terms. In *Knox*, the court looked to the lease terms (and the parties' oral agreement) to conclude that "the original tenancy is deemed to have been extended" and "the extension is a continuation of the tenancy under the original lease." *Knox*, 167 P.2d at 8. Significantly, the court noted the lease lacked formal requirements regarding the exercise of the option. *Id.* Such is the case in the leases before this court. Moreover, the court in *Schmitt v. Felix* stated:

[8] *Knox v. Wolfe* involved a five-year lease ending December 15, 1943, which provided that if the tenant continued in possession with the landlord's consent after the lease had expired, then month-to-month tenancy would result. *Knox*, 167 P.2d 3, 5 (Cal. Dist. Ct. App. 1946). The tenant remained in possession, with the landlord's oral consent, until August 31, 1944. The court interpreted the period between December 15, 1943 and August 31, 1944 as a continuation of the tenancy under the lease. *Id.* at 5.

> the occupancy at the beginning of the "hold-over" term constitutes an extension of the lease term. In the absence of notice to the landlord of any change in that occupancy or of circumstances putting him on notice of that change, the original occupancy continues, even though it be a constructive occupancy.

Schmitt, 321 P.2d 473, 476 (Cal. Dist. Ct. App. 1958). The courts in these cases focused on the original tenancy; and in doing so, relied upon the parties' initial agreement as controlling the relationship even at the expiration of the initial lease term.

[25] Other courts that have interpreted the continuing tenancy as a new tenancy.[9] In *Earle v. Kelley*, the court applied the presumption of § 1945 and held:

> Under the provisions of [§ 1945]. . . it would seem that a new term and a new lease would arise by force of law upon the tenant's holding over and paying rent, just as thoroughly as though a new express lease had been made between the parties for a term within that fixed by the statute. The statute does not extend the old term when the tenant holds over; it creates a new one for a period not exceeding one year.

Earle, 132 P. 262, 264 (Cal. Dist. Ct. App. 1913). In *Miller v. Stults*, the court cited § 1945 and § 1946 in interpreting the terms of the relationship at the end of written lease, and concluded as follows: "A tenancy from year to year is created where a tenant holds over after the expiration of a former lease for one or more years and pays rent, nothing being said between the parties, no agreement as to the time he shall hold being made." *Miller*, 300 P.2d 312, 317 (Cal. Dist. Ct. App. 1956).[10] These cases are distinguishable from the instant case, as the initial leases in *Earle* and *Miller* were for terms of more than one year; *Earle* involved an initial five-year lease and *Miller* involved an initial two-year lease. Under the statutory presumption of § 1945, the term of the continuing lease could not be more than one year. Cal. Civ. Code § 1945. Therefore, any continuing tenancy would have been a new lease and not an extension of the initial five-year lease (in *Earle*) and two-year lease (in *Miller*).

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[9] *Earle v. Kelley* involved an initial five-year lease, executed in 1888, that would have expired in 1893. *Earle*, 132 P. 262, 263 (Cal. Dist. Ct. App. 1913). The tenant (Defendant Kelley), a successor in interest to the original tenant, obtained his interest in 1896. In 1909, Kelley ended his tenancy and vacated the premises, and moved a fixture (a building) off the property. *Id.* at 263. The landlord (Plaintiff Earle) sought damages against Kelley for the removal, and appealed after a jury had found for the tenant (Defendant Kelley). The court in *Earle* examined the law regarding fixtures, and concluded that even if the lease agreement with the original tenant granted the tenant the right to remove fixtures, the right to remove fixtures is lost under a new lease agreement, "even though the new lease is for the same rental and term as the former one, or, in effect, merely a renewal of the old lease." *Id.* at 264.

[10] *Miller v. Stults* involved an initial lease of two years, which expired on October 31, 1946. The relationship continued for another seven years after the expiration of the lease, when notice of termination was given on October 1, 1953. *Miller*, 300 P.2d 312, 315 (Cal. Dist. Ct. App. 1956)

[26] In the case at bar, § 25.01 of the lease contained a specific holdover provision, which provided that if SDA remained in possession after expiration of the lease term without executing a new lease, the parties would enter a month-to-month tenancy with Fixed Rent equal to 150% of the adjusted Fixed Rent that was applicable at the expiration of the lease. This holdover provision was not triggered with respect to Suite 109 because the lease agreement required the landlord's "express written consent" to the holdover. ER, p. 35 (Suite 109 lease agreement). EC gave no such "express written consent" that would have triggered the lease's holdover provision. ER, p. 35 (Suite 109 lease agreement).[11] If EC's "express written consent" had been obtained, the lease's holdover provision would have been triggered, and SDA would have been a month-to-month tenant paying Fixed Rent in the amount of 150% of the adjusted rent that was applicable at the expiration of the lease, but this did not occur. Although generally we look to the lease agreement as the embodiment of the intent of the parties, as a practical matter, the statutory presumption of 18 GCA § 51105 applies, as in this case, when the parties themselves do not comply with the terms of the lease agreement.[12]

[27] Under 18 GCA § 51105 and the "extension" theory, the length of the continuing lease term is dependent on how the rent was paid. If rent under the initial lease was paid monthly, then the "extension" was on a month-to-month tenancy. This would be true even if the original lease was a term for years. *See* CAL. CIV. PRACTICE, REAL PROPERTY LITIGATION § 29:13 (2004) (stating that "if the lease was for a fixed term of five years with rent payable in monthly installments, the tenancy presumed from the holding over is a periodic month-to-month tenancy . . . ."); MILLER & STARR CAL. REAL ESTATE § 19:39 (3d ed. 2003) (stating "if the rent is paid monthly, it is presumed that there has been a renewal as a month-to-month tenancy. The period of extension is presumed to be the same as the period of the rental payments, but not to exceed one year."); *Renner v. Huntington-Hawthorne Oil & Gas Co.*, 244 P.2d 895, 901 (Cal. 1952) (citing § 1945, the court concluded that, after expiration of a twenty-year lease, if "a lessee holds over after the expiration of his term and his lessor accepts monthly rental payments in the amount of the payments which the lessee had been making under the lease, the lessee becomes a tenant from month to month").

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[11] Neither EC nor SDA appealed the trial court's conclusion that SDA was not a holdover tenant pursuant to § 25.01

[12] The statutory presumption of 18 GCA § 51105 would also apply when the parties' lease agreement fails to address the continued possession of the premises by the tenant after the expiration of the lease.

[28] We are persuaded by the California courts' interpretations of the statutory presumption and the extension theory espoused therein. Here, although Suite 109 had an initial lease term of three years, the rent was paid monthly. Therefore, we conclude that as to Suite 109, the parties entered into a month-to-month tenancy at the expiration of the initial lease term on December 1, 1999.

2. Rebutting the Statutory Presumption

[29] The next inquiry is whether there is any evidence to rebut the presumption the parties renewed the lease on a month-to-month basis. *Black v. Black*, 246 P. 90, 92 (Cal. Dist. Ct. App. 1926) (stating that the § 1945 presumption "is a disputable presumption, the force of which is subject to be overcome by other evidence"). The lease for Suite 109 provided for $3,354 in rent and a CAM charge of $503.10 per month for the initial three-year lease term. After the initial term had expired on December 1, 1999, EC billed and SDA paid this same amount until SDA vacated the premises. There was no other evidence to rebut the presumption of 18 GCA § 51105 that the parties "renewed the hiring on the same terms" as the initial lease agreement. In fact, the conduct of the parties reveal that they wanted to continue the initial lease agreement of $3,354 rent and CAM charge of $503.10 per month, rather than exercise the option that would have raised the rent and CAM charge.

3. The Length of the Continued Tenancy

[30] Although the parties entered a month-to-month tenancy, the issue remains whether the month-to-month tenancy, created by 18 GCA § 51105, can continue for more than one year.

[31] California courts interpreting California Civil Code § 1945 have concluded that the limitation of one year applies only to the maximum increment which can be renewed, and does not limit the entire renewal period to one year. In other words, the presumption creates a maximum of a year-to-year term but the year-to-year term may continue for more than one year. *Hagenbuch v. Kosky*, 298 P.2d 875, 878 (Cal. Dist. Ct. App. 1956) ("Under the provisions of section 1945 of the Civil Code, appellant's continued possession of the premises following the expiration of the lease created a tenancy, at the most, from year to year . . . ."). Furthermore, the parties may continue their relationship under the presumption for more than one year. *Renner v. Huntington-Hawthorne Oil & Gas Co.* involved a 20-year lease executed in 1921. *Renner*, 244 P.2d 895. The lease expired in 1941; however, the tenant remained in possession and the landlord accepted payment until the court action was initiated in 1947. *Id.* at 898. Using the presumption of § 1945, the court determined the parties were in a month-to-month tenancy, and, more importantly, that the month-to-

month tenancy still existed because proper notice to terminate had not been given. *Id.* at 901. Even 11 years after the lease expired, the parties were able to continue their relationship under the presumption.

[32] In the present case, the initial lease term for Suite 109 expired on December 1, 1999. Upon expiration of the initial lease, the parties relationship was a month-to-month tenancy that continued until March 15, 2002. The presumption of 18 GCA § 51105 allowed the parties to continue the month-to-month tenancy for more than three years after the initial lease had expired. On the basis of the above discussion, we conclude that the presumption did not limit the parties' month-to-month tenancy to one year.

4. Termination Under Title 18 GCA § 51106

[33] The final issue involving the continued tenancy for Suite 109 is how the parties may properly end their relationship. Termination of the tenancy is governed by Title 18 GCA § 51106 which states in its entirety:

> **Notice to Quit.** A hiring of real property, for a term not specified by the parties, is deemed to be renewed as stated in the last section, at the end of the term implied by law, unless one of the parties gives notice to the other of his intention to terminate the same, at least as long before the expiration thereof as the term of the hiring itself, not exceeding one month.

Title 18 GCA § 51106 (West, WESTLAW through Guam Pub. L. 28-027 (Apr. 22, 2005)). The source of 18 GCA § 51106 is Guam Civil Code § 1946, which is identical to the version of California's Civil Code § 1946 that was originally enacted.[13] In *Palmer v. Zeis*, the court stated specifically that "a tenancy from month to month may be terminated by a notice given under section 1946." *Palmer*, 151 P.2d 323, 324 (Cal. App. Dep't Super. Ct. 1944). Moreover, the court explained that:

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[13] As originally enacted in 1872, California's Civil Code § 1946 states:

> A hiring of real property, for a term not specified by the parties, is deemed to be renewed as stated in the last section, at the end of the term implied by law, unless one of the parties gives notice to the other of his intention to terminate the same, at least as long before the expiration thereof as the term of the hiring itself, not exceeding one month.

Cal. Civ. Code § 1946 Historical & Statutory Notes (West, WESTLAW through Ch. 33 2005 Reg. Sess.). This identical language was enacted by the Guam Legislature as Guam Civil Code § 1946 in 1953. California, however, has amended California Civil Code § 1946 six times since its original enactment, and the current version is now noticeably different from 18 GCA § 51106.

> Even where a definite term, such as one month, is fixed by the parties when the tenant goes into possession, if he holds over without further agreement after the expiration of that term, the term of such holding over is not specified by the parties but is fixed by the law (Sec. 1945, Civil Code), and the case is within the scope of Section 1946, Civil Code.

Id. at 325. Other courts have also concluded that the right to terminate the lease was governed by § 1946. *See Psihozios v. Humberg*, 181 P.2d 699, 703 (Cal. Dist. Ct. App. 1947) (holding that a month-to-month tenancy could be terminated by either party giving one month's notice, in accordance with § 1946 of the Civil Code); *Renner*, 244 P.2d at 901 (Cal. 1952) (holding that because the notice to terminate was not in accordance with § 1946, the lease was not properly terminated and the tenancy was ongoing).

[34] Relying on the California cases in interpreting the notice required to terminate the continued tenancy, the term of Suite 109 is "fixed by the law" as month-to-month in accordance with the presumption of 18 GCA § 51105. The continued tenancy is also "within the scope" of the requirements of notice stated in § 51106, and SDA was only required to give a month's notice before terminating its month-to-month lease. There is no dispute that on or about February 4, 2002, SDA Administrator Michael Mahoney sent a letter to Calvo, stating SDA was terminating its lease effective March 15, 2002. The notice given by SDA was actually more than the month's notice called for in § 51106. Proper notice was given to terminate and rent was fully paid up to the notice of the termination date, therefore, EC is not entitled to damages for the termination of the tenancy for Suite 109.

C. Suite 110

1. The Existence of the Presumption

[35] An examination of the continued tenancy for Suite 110 reveals that the parties renewed the lease on a month-to-month basis. Both requirements of § 51105 were satisfied: first, there is no dispute that SDA remained after the initial lease term expired; and second, EC accepted rent from SDA. The presumption of § 51105 applies to Suite 110.

2. Rebuttal of Presumption - Exercise of the Option

[36] Unlike the evidence presented for the Suite 109 lease, the conduct of the parties constitutes sufficient evidence to rebut the statutory presumption, and reveals that SDA actually exercised its option to extend the lease.

[37] The lease agreement for Suite 110 stated there was an "[i]nitial **three (3)** year Lease Term [and **two (2)** option(s) to extend the Lease Term for an additional **three (3)** year(s) each (the "option period(s)")]." ER, p. 49 (Suite 110 lease agreement). Nothing in the lease agreement indicated how SDA was to notify SDA that it intended to exercise its option, other than a general provision that "[a]ll notices shall be in writing and shall be given by personal delivery, or by deposit in the United States mail, certified, return receipt requested, postage prepaid, in each case addressed to the parties at the addresses appearing on Page 1 of this Lease . . . ." ER, p. 78 (Suite 110 lease agreement). The trial court noted that the option "could be exercised by giving written or verbal notice" or "implied by the action of a party." ER, p. 121 (Decision and Order, Aug. 11, 2003). When reviewing the parties' conduct with regard to Suite 110, the court found after trial that:

> When Plaintiff was sending its invoice[s] to Defendant for Suite 110 and invoiced the Defendant for the rental rate as provided for under an extension of the lease for the fourth and fifth years, Defendant never objected to Plaintiff that there was no lease in effect between the parties or that the fixed rent schedule did not apply.

ER, p. 122 (Decision and Order, Aug. 11, 2003). The trial court concluded that SDA "by its actions herein extended the lease agreements with [EC]. . . Thus, the lease agreement for Suite 110 was extended for another three years to end on April 30, 2002." ER, p. 123 (Decision and Order, Aug. 11, 2003).

[38] On appeal, SDA argues that the trial court's conclusion that SDA exercised its option "is difficult to reconcile" with certain facts, including that the parties were negotiating new lease terms involving a rent reduction, that EC invoiced SDA monthly and accepted SDA's payments, and that SDA "by virtue of its negotiating for new lease terms, made clear its intention to not exercise the option." Appellant's Brief, p. 17. The fact that SDA and EC were negotiating new lease terms does not lead to the "inescapable conclusion" that they understood SDA was not exercising the option to extend. Contrary to SDA's argument that it sought reduced rent separately from any lease for additional space, the May 24, 1999 letter from EC to SDA states that "[t]he rent reductions on the existing leases are contingent upon the leasing of the additional space." ER, p. 132 (Calvo Letter to Geslani). Further supporting the belief that the option had been exercised is that EC invoiced SDA, and SDA paid the invoices in amounts corresponding to the option amounts as stated in § 1.09 of the lease agreement.

[39] Nothing in the lease agreement addresses the manner in which the option must be exercised by SDA. It is widely accepted that the exercise of the option may be implied from the conduct of the parties. "It is the general rule that the lessee's continued occupancy and monthly payment of rent in accordance with the terms of a lease contract after the expiration of the primary term constitutes an election to exercise his option to renew and is sufficient notice to the lessor, where the contract does not call for formal notice to renew." *Pratt v. Dallas County*, 531 S.W.2d 904, 905 (Tex. Civ. App. 1976).

[40] Moreover, the landlord's conduct may result in the landlord waiving notice from the tenant that he or she is exercising the option. One court succinctly stated the rule regarding holdover, payment of rent, and waiver of notice, as follows:

> Where a tenant holds over and pays rent in an amount consistent with the terms of an option to extend or renew the lease, the landlord may treat the tenant as if the tenant has exercised the option regardless of whether the tenant complied with a provision in the lease requiring the tenant to timely notify the landlord of the tenant's intention to exercise the option.

Enter. Co. v. Americom Corp., 510 N.W.2d 537, 541 (Neb. Ct. App. 1993). Other courts are in accord, and place importance on the fact that the tenant paid higher rent, as required by the option.[14] There is a strong argument that, even though the lease here does not indicate the manner by which the option was to be exercised, EC's has waived any requirement of notice.

[41] Especially compelling is the Ninth Circuit Court's decision in a case from Guam. *Oxford Properties & Finance Ltd. v. Engle* involved the issue of a landlord's waiver of a tenant's notice to exercise an option to renew a sublease. *Oxford Props.*, 943 F.2d 1150 (9th Cir. 1991). The Ninth Circuit noted the general principle that notice of exercise of an option "is intended to benefit the

[14] *See Coulter v. Capitol Fin. Co.*, 146 S.E.2d 97, 101 (N.C. 1966) (holding that where the lease provided for increased rent if the lessee exercised its right to extend, and when the lessee held over and paid the increased rent, such conduct "clearly indicates an intent on the part of the lessee to exercise its option to extend the term . . . and a similar intent on the part of the lessor to waive the notice to which she was entitled"); *Carhart v. White Mantel & Tile Co.*, 123 S.W. 747, 751 (Tenn. 1909) (adopting a case that found that "the lease provided for a renewal at an increased rental, the holding over and payment of the increased rent by the lessee was considered evidence of his election to renew, although no proof was offered of the notice prescribed in the lease having been given"); *Lan v. Ahulii*, No. 934, 1916 WL 1438, at *3 (Hawai`i Terr. 1916) (holding that landlord had waived the requirement that the tenant provide notice before exercising the option to extend a lease by accepting the tenant's payments, as the tenant's "action in paying rent at the rate specified in the covenant plainly shows that he intended to exercise the option"); *see also Cicinelli v. Iwasaki*, 338 P.2d 1005, 1011 (Cal. Dist. Ct. App.1959) (stating that "if the option provision gives the lessor the right to demand an *increase* in the rental, to effectively exercise his option to extend the lessee must indicate his willingness to pay the increased rental").

lessor and that, accordingly, the lessor may waive this requirement." *Id.* at 1153. Moreover, not only had the tenant given the landlord written notice, but then had paid a higher amount of rent, prompting the court to conclude that "the level of payment accepted during this [option] period corresponded with the amount due under the lease's terms." *Id.* at 1154. The court held that "the only reasonable view that can be taken of the parties' conduct is that the parties renewed the lease according to the terms set for such a renewal." *Id.*

[42] SDA concedes that it paid the higher rent rate for Suite 110 for two of the three years of the post-expiration period. It is unclear from the record why EC continued to send SDA invoices for the same amount during sixth year. Nevertheless, the parties' conduct after the expiration of the initial three-year lease term expressly complies with the payment of rent for the option period, as outlined in § 1.09 of the lease agreement.

[43] The general principles regarding a tenant's continued possession and payment of increased rent, as discussed above, are substantiated by case law. Likewise, it is also well accepted that notice of exercise of an option may be inferred from the parties' conduct especially when the lease agreement, like the one entered into between SDA and EC for Suite 110, does not expressly state how the option was to be exercised. Because it is not apparent that the court's conclusion creates the "firm and definite conviction that a mistake has been committed," we cannot conclude that the trial court clearly erred in concluding that the parties' conduct evinces their intent to exercise the option as to Suite 110.

D. Waiver of Fixed Rent

[44] SDA argues EC waived its right to the Fixed Rent amounts as stated in the lease agreements, after the expiration of the initial three-year lease term, because EC did not invoice SDA for the increased rent. EC argues it did not waive its rights and § 28.01 of the leases requires that: "No waiver shall be effective unless it is in writing and signed by Landlord." Appellant's Brief, p. 13.

1. Suite 109

[45] With regard to Suite 109, we concluded above that there had been no evidence to rebut the statutory presumption of 18 GCA § 51105, and in fact, the parties' conduct reveals that they wanted to continue the initial lease agreement of $3,354 of rent and a CAM charge of $503.10 per month, rather than exercise the option that would have raised the rent and CAM charge. Moreover, because proper notice was given to terminate with regard to Suite 109, as required by 18 GCA § 51106, EC

is not entitled to any damages for Suite 109.

[46] The trial court ultimately concluded that EC had the right to the increased rental amount in § 1.09 until the end of the three-year option period, and thus, SDA owed additional rent of $51,499.71. EC's right to recover the additional rent for the remainder of the option period was based on the trial court's erroneous conclusion that 18 GCA § 51105 did not apply and that SDA had exercised its option. However, because we determine that SDA did not exercise its option as to Suite 109 and appropriately terminated the continuing tenancy presumed by law, then whether EC waived its right to seek additional rent for this suite for the remainder of the option period is moot. The issue of waiver does not arise in the context of the continued tenancy for Suite 109. EC cannot waive a right to seek the additional rent when it does not have that right in the first place.

2. Suite 110

[47] The trial court found that SDA had exercised its option to extend the lease for Suite 110 for an additional three-year term. We agree. Since SDA exercised its option to extend for Suite 110, EC has the right to seek the amount of rent as provided for in § 1.09 of the lease agreement. EC billed and collected the stated rent amounts for Year 4 (May 1999 to April 2000) and Year 5 (May 2000 to April 2001) but not the amount stated in the lease for Year 6, which was rent of $8,508.85 and CAM charge of $1,296. Instead, the record reveals that for Year 6, EC billed SDA at the same rate as Year 5 (rent of $8,103.66 and CAM of $1,224).

[48] SDA asserts that "undisputed documentary evidence" shows that EC waived the right to seek the Fixed Rental amounts as provided for in § 1.09 of the lease agreement. SDA relies on testimony from Calvo regarding his belief that after the expiration of the initial three-year term, SDA was in a month-to-month tenancy and did not exercise its option to extend. SDA further argues that the actions of EC's agent (Calvo) implicitly resulted in waiver to the Fixed Rent after the expiration of the initial three-year lease term. EC maintains that it had not waived the right to the Fixed Rent in § 1.09, as § 28.01 of the lease agreement requires that any waiver must be "in writing and signed by Landlord." ER, p. 78 (Suite 110 lease agreement). No such writing was ever submitted by SDA; we are unable to escape the conclusion that EC did not waive its right to the increased Fixed Rent.

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[49] EC is entitled to the entire twelve-month period of Year 6 at the amount stated in § 1.09 of the lease agreement, and the total amount remaining due to EC is $19,717.78.[15] This was the same result reached by the trial court. The court below did not clearly err in awarding damages to EC in the amount of $19,717.78 for the additional rents due for Suite 110.

E. Mitigation

[50] A commercial landlord has the duty to make reasonable efforts to mitigate his damages and the burden is on the landlord to show due diligence. *See Guam United Warehouse Corp. v. Dewitt Transp. Servs. of Guam, Inc.,* 2003 Guam 20 ¶ 26. "Whether the injured party violated its duty to mitigate damages is a question of fact for the trier of fact, when there is conflicting evidence on the question." *Id.* Findings of fact after a bench trial are reviewed for clear error. *Yang,* 1998 Guam 9 at ¶ 4.

[51] The trial court was satisfied that EC had mitigated its damages relying on the testimony of Calvo, EC's general manager, that the company had shown the space to realtors and other prospective tenants. SDA insists that the trial court erred in holding that EC had mitigated its damages, because there was a lack of "objective evidence of [EC's] due diligence." Appellant's Brief, p. 22. SDA implicitly argues that the trial court erred in considering EC's proposals to prospective tenants as evidence of EC's due diligence, because such evidence was inadmissible when EC failed to produce its tenant proposals to SDA during discovery.

1. Admissibility of the mitigation evidence

[52] We must first determine whether SDA properly objected to the admissibility of the evidence, thereby preserving its right to appeal the introduction of the evidence. Guam law states in pertinent part that: "Error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and . . . a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context . . . ." Title 6 GCA § 103(a)(1) (West, WESTLAW through Guam Pub. L. 28-027 (Apr. 22,

[15] SDA paid a total of $9,327.66 ($8,103.66 rent plus $1,224.00 CAM charge) per month for 10½ months before terminating on March 15, 2002. ER, p. 127 (Decision and Order, Aug. 11, 2003) SDA should have paid $9,804.85 ($8,508.85 rent plus $1,296.00 CAM charge). EC is entitled to the difference of $477.19 for each month or portion thereof for the 10½ month period, or $5,010.50. In addition, EC has the right to Fixed Rent in the amount of $9,804.85 for the unpaid rent for the remaining 1½ months of Year 6 of the option period, or $14,707.28. Therefore, the total amount remaining due to EC is $19,717.78 ($5,010.50 + $14,707.28).

2005)).

[53] Mr. Maher, the attorney for SDA, questioned Calvo regarding due diligence in seeking new tenants for Suites 109 and 110.

> Q: (Maher): Okay. I noticed in your discovery response that you'll turn over any indication that you had attempted to market this property, or sublet this property. Is there anything to memorialize your attempt to mitigate your damages?
>
> A: (Calvo): Yes, we've given out several proposals to different tenants.
>
> Q: Well –
>
> A: Prospective tenants.
>
> Q: Did you turn them over in discovery?
>
> A: Uhm, no.

Transcript ("Tr.") vol. III, p. 56 (Bench Trial, May 13, 2003). Shortly thereafter Maher follows up with additional questions on EC's due diligence:

> Q: (Maher): [A]nd my question is, is there any proof of your due diligence?
>
> A: (Calvo): Have we tried to sublease it?
>
> Q: Well, just any proof of your due diligence to sublet the premises so as to mitigate your damage?
>
> A: Do you want a proposal to – proposal to lease the space to several different prospective tenants?
>
> Q: I –
>
> A: Is that what you want?
>
> Q: Well, it's a little late now, but they weren't turned over to us.

Tr. vol. III, pp. 58-59 (Bench Trial, May 13, 2003).

[54] Title 6 GCA § 103(a)(1) requires, quite simply, "a timely objection . . . stating the specific ground of objection." Nothing in the transcripts reveals that Maher voiced any objection to the evidence. Maher only asked Calvo for "any proof of [EC's] due diligence to sublet the premises so as to mitigate your damage." Tr. vol. III, p. 56 (Bench Trial, May 13, 2003). Further, nothing in the transcript reveals that Maher made a motion to strike Calvo's testimony. Even if Maher's statement of "Well, it's a little late now" were to be liberally construed as an objection to Calvo's testimony, Maher does not specifically state the grounds of the objection. Finally, despite Maher's implicit argument that EC had violated discovery rules by failing to provide evidence of its due

diligence, Maher does not indicate anywhere in the record that he timely and specifically objected prior to trial.

[55] Nonetheless, although not raised by Maher, we are cognizant of our duty to consider whether the trial court's admission of Calvo's testimony was "plain error[] affecting substantial rights although they were not brought to the attention of the court." 6 GCA § 103(d). This court has acknowledged that plain error analysis is a highly deferential standard. "Only where there is such plain error apparent on the face of the record that failure to review would result in a manifest miscarriage of justice should the appellate court analyze the evidence." *Gutierrez v. Charfauros*, 2002 Guam , ¶ 39 (quoting *Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1459 (9th Cir.1988), *opinion reinstated by* 886 F.2d 235 (9th Cir.1989)); *see also People v. Perez*, 1999 Guam 2, ¶ 21 (stating that plain error "will be found only where necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process"). Moreover, SDA bears the burden of showing that the error that occurred was prejudicial. *See People v. Ueki*, 1999 Guam ¶ 23.

[56] Although Maher now objects to the admission of Calvo's testimony, any error in admitting the testimony is not obvious. During trial Maher states only that the tenant proposals "weren't turned over to us," in an oblique reference to the discovery process. Tr. vol. III, pp. 56, 58-59 (Bench Trial, May 13, 2003). It is not obvious that Maher claims Calvo's testimony is in violation of any discovery orders. Further, we are not persuaded that declining to review the admission of Calvo's testimony would result in "a manifest miscarriage of justice." *Gutierrez*, 2002 Guam 7 at ¶ 39. All relevant evidence is generally admissible, and Calvo's testimony regarding due diligence was relevant to EC's mitigation efforts. *See* Title 6 GCA § 402 (West, WESTLAW through Guam Pub. L. 28-027 (Apr. 22, 2005)). It was within the trial court's discretion to find that, despite the fact that the tenant proposals had not been given to SDA, Calvo's testimony was nevertheless relevant and its probative value outweighed any prejudicial effect. *See People v. Leon Guerrero*, 2001 Guam 19, ¶ 28; Title 6 GCA § 403 (West, WESTLAW through Guam Pub. L. 28-027 (Apr. 22, 2005)). Therefore, it was not plain error for the trial court to admit Calvo's testimony.

2. Trial court's analysis of the mitigation evidence

[57] Having found that it was not plain error for the trial court to admit Calvo's testimony, we next review the trial court's finding that EC had mitigated its damages. In making this finding, the trial court relied on the only testimony regarding mitigation; specifically, that the premises had been

shown to realty companies, individuals, as well as potential tenants.

[58] In examining mitigation in *Guam United*, we did not articulate the standard by which a landlord's mitigation efforts are to be measured. We now adopt the rule of "objective commercial reasonableness." Under this rule, "[a] landlord is obligated to take such steps as would be expected of a reasonable landlord letting out a similar property in the same market conditions." *Reid v. Mut. of Omaha Ins. Co.*, 776 P.2d 896, 906-907 (Utah 1989). However, the landlord's duty to mitigate is not absolute. *See, e.g., Kallman v. Radioshack Corp.*, 315 F.3d 731, 740-41 (7th Cir. 2002) (stating that "the rule of mitigation does not require a landlord to create the best letting conditions possible"); *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293, 299 (Tex. 1997) ("The landlord is not required to simply fill the premises with any willing tenant; the replacement tenant must be suitable under the circumstances."). The standard of commercial reasonableness "is a fact question that depends heavily on the particularities of the property and the relevant market at the pertinent point in time." *Reid*, 776 P.2d at 907. In fact, we have stated that in exercising due diligence, the landlord "is not required to adopt any specific method in attempting to relet the premises." *Guam United*, 2003 Guam 20 at ¶ 26 (quoting *J.M. Grimstand, Inc. v. Scangraphics, Inc.*, 539 N.W.2d 732, 734 (Iowa Ct. App. 1995)).

[59] EC's mitigation efforts included sending proposals to tenants and showing the space to realty companies and individuals. We reiterate our holding that there are no "specific methods" that must be used to show a landlord has exercised due diligence, and we are mindful that the duty to mitigate is not absolute. *See Guam United*, 2003 Guam 20 at ¶ 26. In light of our rule, EC's efforts appear to be steps that any reasonable landlord would have taken to relet the property. Because we do not have "the definite and firm conviction that the court below committed a mistake," we hold that the trial court was not clearly erroneous in finding that EC had mitigated its damages. *Yang*, 1998 Guam 9 at ¶ 17.

V.

[60] We first hold that 18 GCA § 51105 applies to commercial leases and the trial court erred in determining otherwise. We next hold that, under the facts of this case, the statutory presumption found in 18 GCA § 51105 applies to both Suite 109 and 110; however, the presumption was rebutted with regard to the latter. In light of this holding, we **REVERSE** the trial court's award of damages

with regard to Suite 109, but affirm the award with regard to Suite 110. We further hold that SDA waived its claim of error regarding the trial court's admission of evidence pertaining to mitigation. Therefore, the trial court's decision is **AFFIRMED** in part, and **REVERSED** in part. The matter is **REMANDED** for the entry of judgment consistent with this opinion.