IN THE SUPREME COURT OF GUAM

GUAM UNITED WAREHOUSE CORPORATION,
Plaintiff-Appellee / Cross-Appellant

vs.

DeWITT TRANSPORTATION SERVICES OF GUAM, INC.,
A Guam Corporation,
Defendant-Appellant / Cross-Appellee

OPINION

Supreme Court Case No.: CVA02-015
Superior Court Case No.: CV2095-93

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Appeal from the Superior Court of Guam
Argued and submitted on April 7, 2003
Hagåtña, Guam

Plaintiff-Appellee/Cross-Appellant:
James M. Maher, Esq.
Maher & Thompson, P.C.
140 Aspinall Ave., Ste. 201
Hagåtña, GU 96910

Defendant-Appellant/Cross-Appellee:
Vincent Leon Guerrero, Esq.
Thomas C. Sterling, Esq.
Klemm, Blair, Sterling & Johnson
A Professional Corporation
Ste. 1008, PDN Building
238 Archbishop F.C. Flores Street
Hagåtña, GU 96910

BEFORE: F. PHILIP CARBULLIDO, Chief Justice; JANET HEALY WEEKS and MIGUEL S. DEMAPAN, Justices *Pro Tempore*.

CARBULLIDO, C.J.:

[1] Defendant-Appellant-Cross-Appellee DeWitt Transportation of Guam (hereinafter "DeWitt") appeals the trial court's decision, which found the existence of a valid and enforceable contract between itself and Plaintiff-Appellee-Cross-Appellant Guam United Warehouse Corporation (hereinafter "Guam United"). Guam United cross-appeals and alleges that the trial court committed the following errors with respect to the damages issues: in awarding interest on DeWitt's security deposit; in awarding simple instead of compound interest on the judgment; in concluding that Guam United failed to mitigate its damages; in denying Guam United's request for rent in the cold storage unit; in denying Guam United's request for the cost of repair by Quality Builders; and, in allowing an undisclosed witness to testify. We affirm in part and reverse in part.

I.

[2] On August 12, 1971, the Guam Economic Development Authority entered into a lease with the Guam Development and Investment Corporation (hereinafter "GEDA Lease") for property located in Cabras Island. Guam Development and Investment Corporation assigned its interest in the GEDA Lease to its sister company, Guam United on October 31, 1972. On August 13, 1982, a Management Agreement was executed between Guam United and Coral Transportation & Warehouse Co., Ltd., for a term of three years, ending on May 31, 1985.

[3] Coral Transportation was acquired by DeWitt around November 1, 1983. Thus, when the 1982 Management Agreement expired, on June 1, 1985, Guam United and DeWitt executed another Management Agreement (hereinafter "old Management Agreement") for the use of the Cabras lot and

warehouse for a six-year term expiring on May 31, 1991. Under this old Management Agreement, DeWitt was required to place a $26,000.00 security deposit and make monthly payments of $17,000.00.

[4] In anticipation of the old Management Agreement's expiration, in early October 1990, the parties commenced negotiations for a new agreement.[1] Despite various drafts and discussions, no new agreement was finalized when the old Management Agreement expired.[2] Resultingly, the parties entered into a month-to-month arrangement until an agreement could be finalized. Under this temporary arrangement, DeWitt was required to place a $54,400.00 security deposit and to make monthly payments of $27,200.00.

[5] The parties were able to finally reach an agreement (hereinafter "new Management Agreement"), which was drafted by Guam United and sent to DeWitt in early November, 1992.[3] Through its President, Patrick Mack (hereinafter "Mack"), DeWitt signed the agreement on December 11, 1992. Under the terms of the new Management Agreement, DeWitt's security deposit remained at $54,400.00, with the following payment scheme: (1) January 1, 1993- December 31, 1993, monthly payments of $26,680.00 and (2) January 1, 1994- December 31, 1994, monthly payments of $29,880.00. DeWitt sent the signed

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[1] The negotiations even included potential plans for the building of a new warehouse by Guam United. However, these plans were abandoned.

[2] Around this time frame, Guam United was receiving official complaints from the Port Authority of Guam regarding the damages that DeWitt was causing to the premises. *See* Guam United Excerpts of Record, p. 147-151 (Port Authority Letter, April 30, 1991) (expressing "[o]n several occasions over the last three years, we have attempted to work with DeWitt Transportation to clean up your leased area and remove all nuisances they have created on Cabras Island.").

[3] The finality of this agreement is reflected from the following two correspondences from Guam United's President, Joe Fang to DeWitt:

1. "Have you received the Management Agreement which I faxed to you two days ago? I need your comments right away *in order that I may prepare the final document* for your signature before I leave Guam this week-end." Guam United Excerpts of Record, p. 141 (Letter to Pat Mack from Joe Fang, dated November 13, 1992).

2. "Enclosed please find the Management Agreement reflecting the changes we had agreed upon on Friday. This is essentially the Agreement you had agreed to sign last year, except that I have taken out the part relating to the Personal Guaranty. I hope you will not find it necessary to make too many changes so we can get on with the signing. Guam United Excerpts of Record, p. 143 (Letter to Pat Mack from Joe Fang, dated November 16, 1992).

new Management Agreement to Guam United, however, Guam United failed to immediately execute it. Instead, on December 29, 1992, Guam United sent a letter to DeWitt, which began with "[w]hen we were on Guam last week, I spoke to Jerry Ingling [sic] about *resolving the following issues before we can execute the lease which you already signed. . .*" *See* DeWitt's Excerpts of Record, tab M, pp. M1-M2 (December 29, 1992 letter). DeWitt failed to respond to the December 29 letter and on January 7, 1993, Guam United sent a follow up letter seeking confirmation of the issues raised in its December letter.

[6] However, DeWitt did not respond to the January 7 correspondence. In light of its fear that it did not have a commitment from Guam United for the use of Guam United's warehouse, DeWitt felt it had to relocate its operations. Consequently, DeWitt began negotiations with Sigallo Pac Ltd. for the use of another warehouse facility and on February 3, 1993, DeWitt and Sigallo Pac entered into a sublease for the Sigallo Pac warehouse. However, even with the Sigallo Pac warehouse agreement, DeWitt continued to make monthly payments of $27,200.00 to Guam United and to occupy the Cabras premises.[4]

[7] On February 23, 1993, Guam United, through its President Maria Chen, finally signed the new Management Agreement. The two parties met on February 26, 1993, wherein Mack apparently flaunted to Guam United Owner Joe Fang (hereinafter "Fang") a draft letter from a San Diego attorney, which purported to rescind the new agreement.[5] However, Mack failed to execute and deliver the letter to Fang

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[4] During trial, DeWitt explained that it could not easily abandon the Cabras facility because it needed to effectuate a move and prepare the Sigallo Pac warehouse for inspection by the military.

[5] This letter provided the following:

> Please be advised that DeWitt Transportation Services of Guam, Inc., has never agreed to the additional provisions contained in your memo to Mr. Pat Mack dated December 29, 1992, that these issues are still not resolved, and that it appears the parties cannot resolve them. In addition, DeWitt Transportation Services of Guam, Inc. hereby revokes and rescinds any and all previous offers to extend the terms of its existing month to month Management Agreement in connection with the Premises and/or to enter into any new Management Agreement in connection with the Premises. Please accept this notice as our thirty (30) day notice to terminate the existing month to month Management Agreement in connection with the Premises.

on that night or any day after. When Fang insistently inquired if DeWitt intended to rescind their agreement, Mack replied in the negative.[6]

[8] Apparently, DeWitt was attempting to sublease the premises to another party and informed Guam United of its attempts to do so.[7] However, around March 1993, Guam United discovered the premises empty. DeWitt, however, continued to make payments until April. Although, it promised to pay May's rent, DeWitt failed to do so. When Guam United inquired whether it had abandoned the warehouse completely, DeWitt's manager, Jerry Yingling, indicated that it had not. Moreover, Mack subsequently affirmed DeWitt's intention to utilize the premises, stating that DeWitt had only changed its operations and that the premises would instead be used for storage in conjunction with American President Lines and their vague joint-business venture. DeWitt continued its attempt to sub-let or to broker the premises to several different entities through July of 1993. One of these entities was American President Lines. In a letter dated July 13, 1993, American Presidents Lines offered to lease the Cabras premises for a ten-year term. However, Guam United immediately counter-offered asking for a higher price, and thus a contract never materialized. By July 1993, DeWitt formally abandoned its efforts to sub-let the premises and Guam United effectively terminated the new Management Agreement shortly thereafter.

Guam United Excerpts of Record, p. 74 (Letter dated February 19, 1993 from DeWitt to Fang).

[6] During trial, Mack testified that he was under the impression that during the February 26, 1993 meeting, the parties formed a new agreement, wherein DeWitt would assist Guam United in finding a third party to sublease the property. Transcript, pp. 110-11 (Bench Trial, Feb. 26, 2002)

[7] DeWitt's attempts to sub-let the premises is reflected in the following correspondence:

> As per our agreement at our February 26th meeting, we will attempt to sub-lease the warehouse for the *remainder of our two year lease* dated January 1, 1993. As per the terms of the lease we will submit any prospective sub-lessee to you in writing for your approval. In conjunction with this, we will immediately start marketing the property and warehouse.

DeWitt's Excerpts of Record, tab P (Letter dated March 2, 1993 to Mr. Joe Fang from Mr. Pat. Mack) (emphasis added).

[9] On December 28, 1993, Guam United filed a Complaint seeking damages for the breach of the new Management Agreement. On January 28, 1994, DeWitt filed an Answer and Counterclaim. On February 22, 1994, Guam United filed a First Amended Complaint for Damages for Breach of Written Management Agreement, which prayed for the following forms of relief: (1) compensatory damages for repair of the warehouse property in the amount of $227,021.35; (2) unpaid monthly income increments for the period January 1, 1993, through December 31, 1994, in the amount of $213,440.00; (3) unpaid monthly income increments for the period from January 1, 1994, through December 31, 1994, in the amount of $29,880.00 per month or the total sum of $358,560.00; (4) damages for unpaid PUAG charges in the amount of $3,114.87; (5) reasonable attorney's fees and expenses incurred in this suit; and (6) costs of suit. On March 29, 1994, DeWitt filed an Answer to First Amended Complaint and Counterclaim, which sought damages in the amount of $197,000.00 for Guam United's alleged interference with its use of the premises. DeWitt also sought the return of its security deposit in the amount of $54,400.00. On April 18, 1994, Guam United filed an Answer to Counterclaim.

[10] On November 15, 1996, Guam United filed a motion for summary judgment on the issue of liability on its claims for relief. DeWitt filed its opposition on December 3, 1996. Guam United filed its reply to the opposition and the matter was heard on December 18, 1996 by then Judge Frances Tydingco-Gatewood. On July 3, 1997, the trial court granted Guam United's motion as to liability for repairs to the warehouse but precluded summary judgment on the remaining claims. A bench trial was held on January 29 and 30, 2002 and February 25, 26, 27, and 28, 2002. The trial court issued a Decision and Order on May 29, 2002 and held that the new Management Agreement constituted a valid and binding agreement between the two parties and awarded Guam United damages for repair on the premises as well as for unpaid rent and utilities. However, the trial court also held that Guam United failed to mitigate its damages and limited DeWitt's liability to the unpaid rent up to the time of the new Management Agreement's

termination on July 1993. An Appeal by DeWitt and a Cross-Appeal by Guan United were filed to this court.

II.

[11] This court has jurisdiction over this matter pursuant to Title 7 GCA §§3107, 3108(a) (1994).

III.

[12] We address the issues presented in this case in two parts. The first part deals with the original Appeal filed by DeWitt, which focuses on the issues surrounding the validity of the new Management Agreement. The second part deals with the Cross-Appeal filed by Guam United, which addresses various damages issues.

A. Existence of a Valid Agreement

[13] We begin our analysis by addressing the threshold issue brought forth on Appeal, which is, whether the trial court properly found the existence of a valid and binding agreement between Guam United and DeWitt. The standard of review following a bench trial is that the trial court's "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." See Town House Dep't Stores, Inc. v. Ahn et al, 2000 Guam 32, ¶ 13 (citations omitted). "However, its conclusions of law are reviewed de novo." *Id*. Whether a binding contract was entered into by the parties "depends on the intention of the parties and is a question of fact." *Homestead Golf Club, Inc. v. Pride Stables*, 224 F.3d 1195, 1199 n. 4 (10th Cir. 2000). *St. Francis Mercantile Equity Exchange, Inc. v. Newton*, 996 P.2d 365, 369 (Kan. App. Ct. 2000) (noting that the standard of review "to decide whether the district court's finding of an enforceable contract is supported by substantial competent evidence . . . ."); *Lussier v.*

Spinnato, 794 A.2d 1008, 1013 (Conn. App. 2002) ("The existence of a contract is a question of fact to be determined by the trier on the basis of all the evidence.").

[14] The trial court held that the new Management Agreement was a valid and binding contract that existed between Guam United and DeWitt. The trial court's holding was based on its finding that DeWitt "had the opportunity to rescind its consent to the new Management Agreement, but instead, "did nothing to show it was no longer bound by the new Management Agreement." DeWitt's Excerpts of Record, tab D, p. D10. We agree. After carefully reviewing the transcripts and the correspondences between the parties, for the following two reasons, we hold that the trial court did not err in finding the existence of a valid enforceable contract between Guam United and DeWitt.

[15] First, we are convinced that the new Management Agreement represents a final manifestation of the parties' intent to be bound to a contract. *See Addiego v. Hill*, 238 Cal. App.2d 842, 846 (Cal. App. 1965) ("[t]he modern trend of the law *is to favor the enforcement of contracts* and, if feasible, *to carry out the intentions of the parties*") (emphasis added). It is uncontroverted that the new Management Agreement was signed by both parties.[8] *Lamson v. Horton-Holden Hotel Co.*, 185 N.W. 472, 476

[8] We readily dispose of DeWitt's challenge to the enforceability of the new Management Agreement based on non-compliance with the statute of frauds in light of Guam United's failure to immediately sign the contract. Although we agree with DeWitt's assertion that the new Management Agreement falls within the ambit of the statutes of fraud, we disagree with its contention that the new Management Agreement did not properly comply with the statutes of fraud. *See* Title 18 GCA § 86106; 21 GCA § 4101; 6 GCA § 6101; *O'Connel v. Cora Bett Thomas Realty, Inc.*, 563 S.E.2d 167, 170 (Ga. App. 2002) (noting that "[b]ecause the lease is for a term in excess of one year, it falls within the statute of frauds, which requires that the contract be in writing and *signed by the party to be charged therewith* or some person lawfully authorized by him.") (citations and internal quotations omitted); *Tang v. Loveland*, 1 P.3d 922, 924 (Kan. App. 2000) (noting that "It is thus useful to ascertain what *effect* signing and delivery by the landlord had on the lease. The effect is that the lease also became actionable *by tenant* . . ., since landlord, as the party to be charged, signed the memorandum of the agreement. The lease agreement without the signature and delivery by landlord remained valid and enforceable only by landlord against tenants (who signed)."). In the present case, there is no dispute that the party to be charged, DeWitt, signed the new Management Agreement. Guam United correctly argues that in the present case "the party to be charged and the party disposing of same subscribed in writing. As such, there has been compliance with the statutory requirements governing contracts affecting real property for a period longer than one year." Plaintiff-Appellee's Opposition Brief, p. 14.

Additionally we find DeWitt's reliance on the case of *Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partner*, 52 Cal. App.4th 867 (Cal. App.4 Dist., 1997), unpersuasive because in that particular case, the

(Iowa 1921) ("The concurrence of the minds of the parties may be evidenced 'by mutual, written or spoken words; or by offer accepted in terms; or by offer acted upon. If the thing to be done is set down in writing, *the parties signing and delivering it mutually consent to the same thing at the same instant*.") (emphasis added). Both signatories of the new Management Agreement openly admitted at trial that when they signed the agreement, they intended to be bound by it. *See Berry v. Crouse*, 376 S.W.2d 107, 113 (Mo. 1964) (expressing that "evidence was not sufficient to show that the parties executed the . . . lease without intending it to be any effect. If a written instrument, *on its face*, expresses a contractual obligation, one of the parties should not be permitted to avoid it on the grounds that it was never intended as such unless the evidence to such effect is cogent and convincing.") (emphasis added). DeWitt's President, Mack, declared during trial that when he signed the new Management Agreement, he intended to be bound by it. *See* Transcripts, p. 104 (Bench Trial, Feb. 26, 2002)[9]. DeWitt's desire to finalize an agreement was further illustrated by the fact that "[the] agreement was needed to satisfy its military customers and there was much urgency in securing a lease which needed to be presented to the military." Guam United's Excerpts of Record, tab D (Decision and Order). Furthermore, Guam United, too, admitted that it was bound by the Agreement. Transcripts, pp. 24-25 (Bench Trial, February 25, 2002). During trial, Fang expressed the following sentiments regarding the status of the Agreement:

> There was never any question that we would sign the agreement. We had never told him at any time—anyone in their operation – that we would not sign it. If there's anything

party to be charged, the landlord, did not sign the agreement that fell within the purview of the statute of frauds.

[9] The fact that Mack may have changed his mind sometime in January (after signing the Agreement) because of the uncertainty from Guam United's end is not dispositive, especially since neither DeWitt nor Mack expressed this change of intent. Transcripts, pp. 104-105 (Bench Trial, Feb. 26, 2002); *see Brinton v. Bankers Pension Services, Inc.*, 76 Cal. App. 4th 550, 560 (Cal. App. 1990) ("The law imputes to a person an intention which corresponds to the reasonable meaning of his or her words and acts. Thus, where a person's words or acts, judged by a reasonable standard, manifest an intent to agree to a certain matter, that agreement is established, regardless of what may have been the person's real but unexpressed state of mind on the subject.").

> about the history of our dealings with DeWitt is that agreements are always signed after the fact, months and months after the fact, but no one has ever questioned really that the agreements won't be signed. . . .

Transcripts, p. 210 (Bench Trial, January 29, 2002). Moreover, the new Management Agreement was not a product of premature negotiations by parties who did not share a previous relationship. Rather the finality of Agreement is evidenced from the fact that it was a product of over one year of negotiations that commenced even before the old Management Agreement expired. Consequently, based on the evidence presented at trial, the parties intended to be bound by the new Management Agreement and no sufficient evidence was produced to demonstrate deficiency in the formation of that Agreement. *See Berry v. Crouse*, 376 S.W.2d 107, 113 (Mo. 1964) (noting that the "testimony and the other evidence of the circumstances surrounding the transaction are sufficient to show that the farm lease was not what, on its face, it purports to be, the contract of the parties.").

[16] Second, we find ample evidence to support the trial court's conclusion that DeWitt failed to timely rescind, and therefore ratified the Agreement through its subsequent conduct.[10] The following discussion demonstrates how DeWitt's failure to effectively rescind the contract resulted in its ratification of the new Management Agreement.[11]

[17] We agree with the trial court's deduction that, if "[Guam United] repudiated the new Management

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[10] DeWitt argues that the December 29, 1992 letter constituted a repudiation or a counter-offer, and thus, invalidated the new Management Agreement. We find DeWitt's argument unconvincing. The issues raised in the letter can easily be construed as elements expressly left out by the parties to be addressed in the future. *See Metro-Goldwyn-Mayer, Inc. v. Scheider*, 40 N.Y.2d 1069, 1070-1071 (N.Y., 1976) (noting that "[w]here the parties have completed their negotiations of what they regard as essential elements, and performance has begun on the good faith understanding that agreement on the unsettled matters will follow, the court will find and enforce a contract even though the parties have expressly left these other elements for future negotiation and agreement."); *Guzman v. Visalia Community Bank*, 71 Cal.App.4th 1370, 1376 (Cal.App. Dist. 1999) ("On the other hand, it is not necessarily true that any communication other than an unequivocal acceptance is a rejection. Thus, an acceptance is not invalidated by the fact that it is 'grumbling,' or that the offeree makes some simultaneous 'request.'") (citations and quotations omitted).

[11] *See* Title 18 GCA § 85324. Ratification of void contract. "A contract which is voidable solely for want of due consent, may be ratified by a subsequent consent."

Agreement in its December 29, 1992 letter, [then] why did [DeWitt] continue to pay rent up until April, 1993. The actions of [DeWitt] in paying that month's rent and in further advising [Guam United] it was making attempts to pay the May, 1993 rent does not indicate . . . a party who did not feel bound by the agreement." DeWitt's Excerpts of Record, tab D, pp. D10-11. Therefore, if DeWitt claimed that it was only bound under a month-to-month tenancy and not the new Management Agreement, then why did it feel bound to make the payments. The fact that DeWitt felt obligated to pay the monthly rent even after it had somehow abandoned the premises is inconsistent with its claim that it was not bound by the new Management Agreement. DeWitt's argument is especially unconvincing in light of its awareness that it could have easily terminated this month-to-month tenancy through a thirty-day notice as evidenced by the draft letter its San Diego attorney prepared. *See* Guam United's Excerpts of Record, p. 74 (draft letter expressing "Please accept this notice as our thirty (30) day notice to terminate the existing month to month Management Agreement.").

[18] Moreover, the trial court correctly found that "[DeWitt had to be bound to the agreement in order to have had the opportunity to proceed with its intended sublease of the premises." DeWitt's Excerpts of Record, tab D, p. D11. Here, DeWitt recognized the existence of its two year lease in the following facsimile from Mack to Fang, which provided:

> As per our agreement at our February 26th meeting, we will attempt to sub-lease the warehouse *for the remainder of our two year lease dated January 1, 1993*. As per the terms of the lease we will submit any prospective sub-lessee to you in writing for your approval. In conjunction with this, we will immediately start marketing the property and warehouse.

DeWitt's Excerpts of Record, tab P (Letter dated March 2, 1993 to Mr. Joe Fang from Mr. Pat Mack) (emphasis added); *Houk v. Williams Bros.*, 58 Cal. App.2d 573, 580 (Cal. App. 1943) ("These declarations and conduct constituted adequate evidence of assent and ratification of the contract as altered, and estopped the defendant from subsequently denying the validity of the contract on that account.").

Furthermore, not only was DeWitt's recognition evident, but its determination to sublease the premises, effectively resulted in its ratification of the new Management Agreement. *See Leboire v. Black*, 84 Cal. App.2d 260, 262 (Cal. App. 1948) (finding that party's assignment of an agreement was a recognition in writing of the validity of the contract even though it was previously altered by the seller upon signing).

[19] Additionally, DeWitt failed to take numerous opportunities to rescind the agreement. *See Houk v. Williams Bros.*, 58 Cal. App.2d 573, 578 (Cal. App. 1943) (noting that "ratification may be shown by any conduct from which assent can fairly be implied. Silence may be enough.") (citations and quotations omitted). During the meeting that occurred on February 26, 1993, Mack had the opportunity to rescind the contract, especially since Fang had asked him whether or not they had an agreement, but Mack failed to do so.[12] *See* Transcripts, p. 210 (Bench Trial, January 29, 2002) (testimony of Fang: "And I asked Pat Mack point blank, I said, 'Does that mean we don't have an agreement?' he said, 'No, it does not mean that at all.'"); *Soggy v. Harvey*, 134 Cal. App. 2d 116, 122 (Cal. App. 1955) ("Diligence is a condition of the right to rescind, and the right is lost by delay."). Also during that meeting, Mack was in possession of a letter prepared by its attorney, which would have effectively rescinded the new Management Agreement, but again Mack failed to deliver and effectuate the letter. This letter provided the following:

> Please be advised that DeWitt Transportation Services of Guam, Inc., has never agreed to the additional provisions contained in your memo to Mr. Pat Mack dated December 29, 1992, that these issues are still not resolved, and that it appears the parties cannot resolve them. In addition, DeWitt Transportation Services of Guam, Inc. *hereby revokes and rescinds any and all previous offers to extend the term of its existing month to month Management Agreement in connection with the Premises* and/or to enter into any new Management Agreement in connection with the Premises. Please accept this notice as our thirty (30) day notice to terminate the existing month to month Management Agreement.

[12] This would have presented a perfect opportunity for DeWitt to rescind the contract since it had already executed the Sigallo-Pac Ltd. lease on February 3, 1993. DeWitt's Excerpts of Record, tab O, pp. O1-O8) (Agreement to Lease).

Guam United's Excerpts of Record, p. 74 (Facsimile Transmittal from Richard L. Moskitis, Esq. To Pat Mack, dated February 19, 1993). Furthermore, when Fang again inquired whether DeWitt was canceling the contract (after Mack quickly showed Fang the letter), Mack replied in the negative. *See* Transcripts, p. 214 (Bench Trial, January 29, 2002) (Fang testimony: "[s]o after reading the letter, I asked him, 'Do we have an agreement? Does that mean you're canceling our agreement?' he said, 'No, that does not mean that at all.' He said, 'I'm working on some interesting deal and you'll find out about it very quickly.'"); *Soggy v. Harvey*, 134 Cal. App. 2d 116, 122 (Cal. App. 1955) ("A party rescinding must rescind promptly on discovering the facts which entitle him to rescind.").

[20] In essence, based on the parties' intent to be bound to the new Management Agreement and DeWitt's failure to promptly rescind the contract, we hold that the trial court did not err in finding the existence of a valid agreement.

B. DAMAGES

[21] In light of our affirmation of the trial court's finding that the new Management Agreement was a valid agreement, we now address the issues raised in Guam United's Cross-Appeal with respect to the damages portion of the trial. On Cross-Appeal, Guam United argues that the trial court committed the following errors: (1) awarding interest on defendant's security deposit; (2) concluding that DeWitt has met its burden of proof on it's affirmative defense that Guam United had failed to mitigate; (3) denying the cost of repair by Quality Builders; (4) awarding simple interest on the judgment; (5) denying reasonable rent for the cold storage unit; and, (6) permitting an undisclosed rebuttal witness to testify.

1. Interest on the Security Deposit

[22] The first damages issue presented on cross-appeal is whether the trial court erred in awarding pre-judgment interest on DeWitt's security deposit. The standard of review for a lower court's award of interest is an abuse of discretion. *Sumitomo Construction Co., Inc. v. Government of Guam*, 2001

Guam 23, ¶ 7; *see Pabst v. Oklahoma Gas & Elec. Co.*, 228 F.3d 1128, 1136 (10th Cir. 2000). We review contract construction *de novo*. *See Apana v. Rosario*, 2000 Guam 7, ¶ 9; *State Farm Mut. Auto. Ins. Co. v. George Hyman Constr. Co.*, 715 N.E.2d 749, 754-55 (Ill. App. Ct. 1999). "In interpreting a contract, the language governs if clear and explicit and not involving absurdity." *Ronquillo v. Korea Auto., Fire, & Marine Ins. Co.*, 2001 Guam 25, ¶ 10 (citing Title 18 GCA §87104 (1992)).

[23] In the present case, the trial court awarded pre-judgment interest "at the rate of 6% per annum on the damages" incurred by Guam United as a result of DeWitt's breach of the new Management Agreement. DeWitt's Excerpts of Record, tab D, p. D26 (Decision and Order, May 29, 2002). However, because Guam United was in possession of DeWitt's security deposit in the amount of $54,400.00, the trial court granted DeWitt judgment in this amount and ordered that the amount "shall be set off against [Guam United's] judgment." DeWitt's Excerpts of Record, tab E, p. E2 (Judgment, June 10, 2002).[13] Guam United argues that even though the new Management Agreement precludes the security deposit from earning interest, the trial court did not err in awarding pre-judgment interest on DeWitt's security deposit. We disagree.

[24] In determining whether the trial court correctly awarded interest on the security deposit, we "look[] to the . . . [new Management Agreement's] four corners to determine the parties' intentions, which are controlling." *Bakowski v. Mountain States Steel, Inc.*, 52 P.3d 1179, 1184 (Utah 2002). Under the plain language of the new Management Agreement, DeWitt was not entitled to receive any interest on the security deposit. *See Bakowski v. Mountain States Steel, Inc.*, 52 P.3d 1179, 1184 (Utah 2002) ("If the language within the four corners of the contract is unambiguous, then a court does not resort to extrinsic evidence of the contract's meaning, and a court determines the parties' intentions from the plain meaning

[13] In addition to DeWitt's security deposit, the trial court also granted DeWitt judgment on the lease payments it made, which exceeded the amount required under the new Management Agreement. DeWitt's Excerpts of Record, tab E, p. E2 (Judgment, June 10, 2002).

of the contractual language as a matter of law."). Similar to the previous Management Agreements that the parties executed, the new Management Agreement expressly precluded the security deposit from earning any interest and provided that "[s]uch [security] deposit is to assure the full performance of all terms of conditions of this Agreement by Manager and *such shall not accrue any interest*." Defendant-Appellant's Excerpts of Record, tab L, p. L2 (new Management Agreement); s*ee* Defendant-Appellant's Excerpts of Record, tab H, p. H2 (Management Agreement dated August 13, 1982, Section 4); Defendant-Appellant's Excerpts of Record, tab I, p. I2 (Management Agreement dated June 1, 1985, Section 4). In addition, under the new Management Agreement, another provision was included, section 5(d), entitled "No Interest Earned," which provides that the "Manager will not be entitled to any interest at any time on any portion of the security deposit." Defendant-Appellant's Excerpts of Record, tab L, p. L4 (new Management Agreement). Section 5(d)'s inclusion in the new Management Agreement clearly evidences the parties' intent that no portion of the security deposit will earn "any interest at any time."

[25] Consequently, having affirmed the existence and validity of the new Management Agreement above, we must also give credence to the provisions found in the new Management Agreement, that were bargained for and agreed upon by the parties, including those that preclude the security deposit from earning interest. *Central New Haven Development Corp. v. La Crepe, Inc.*, 413 A.2d 840, 842 (Conn. 1979) (noting that "[t]he *intention of the parties is controlling* and must be gathered from the language of the lease in the light of the circumstances surrounding the parties at the execution of the instrument . . .") (citations and quotations omitted) (emphasis added). Thus, we hold that the trial court erred in awarding pre-judgment interest on DeWitt's security deposit.

2. Mitigation

[26] The next issue we address on cross-appeal is whether the trial court correctly found that Guam United failed to mitigate its damages in light of an offer it received on July 11, 1993. "[W]hether the injured

party violated his duty to mitigate damages is a question of fact for the trier of fact, when there is conflicting evidence on the question." *Fairway Builders, Inc. v. Malouf Towers Rental Co.*, 603 P.2d 513, 526 (Ariz. App. 1979), *see also* Title 6 §2117 (1996) ("All questions of fact, on trial before a jury, judge, referee or other officer are to be decided by the jury, judge, referee or other officer, and all evidence thereon is to be addressed to them"). "[A] commercial landlord has a duty to make reasonable efforts to mitigate its damages when its tenant abandons the leased property." *O'Brien v. Black*, 648 A.2d 1374, 1374 (Vt. 1994). The duty to mitigate is triggered "as soon as the landlord has notice of the tenant's abandonment, even if the lease has not been formally terminated." *Id*. *"The burden is on the lessor to show due diligence* and the lessor is not required to adopt any specific method in attempting to relet the premises." *J.M. Grimstand, Inc. v. Scangraphics, Inc.*, 539 N.W.2d 732, 734 (Iowa App. 1995) (emphasis added); *Harmsen v. Dr. MacDonald's, Inc.*, 403 N.W.2d 48 (Iowa App. 1987); *S.N. Mart, Ltd. v. Maurices Inc.*, 451 N.W.2d 259, 261 (Neb. 1990). A landlord's duty to mitigate its damages is a fairly modern trend and emanates from the recognition "that a modern lease is far more than a conveyance of an estate in land," but rather, both a "conveyance and a contract." *O'Brien v. Black*, 648 A.2d 1374, 1374 (Vt. 1994). The policy for imposing such a duty is "to insure that the[] landlords respond reasonably to their tenants' abandonment." *O'Brien v. Black*, 648 A.2d 1374, 1376-1377 (Vt. 1994) (citations omitted).

[27] In the case at bar, Guam United requested the trial court to award it $416,617.00 in unpaid rent.[14] However, because the trial court concluded that Guam United failed to mitigate its damages after the new

[14] The total amount of unpaid rent is $599,000.00, which takes into account (1) $213,440.00 (rent from May 1993 to December 1993 at $26,680.00 per month) and (2) $385,560.00 (rent from January 1994 to December 1994 at $29,880.00 per month). However, this amount is reduced by $182,363.00, the amount of rent Guam United received after the termination of the lease agreement from other tenants.

Management Agreement was terminated on July 1993, the trial court awarded Guam United only $80,040.00, or the amount of unpaid rent during the months of May, June, and July 1993. The trial court concluded that Guam United failed to mitigate its damages because it found that Guam United had received a valid offer to rent its premises from Ambyth and American President Lines. Additionally, the trial court found that "[h]ad [Guam United] leased its facilities to American President Lines' . . . and Ambyth Shipping based on the letter of intent of July 11, 1993, it could have received $490,860 from a tenant for the same period that it now seeks damages of $416,617 from DeWitt." (Decision and Order). We agree.

[28] Contrary to Guam United's assertion that "the lower court record is simply devoid of any evidence that tends to remotely support the inference that Guam United failed to deal in good-faith with APL or the other two entities," Guam United's Cross-Appellant's Brief, pp. 20-21, a close examination of the record, especially focusing on the correspondences of the parties reveals that the trial court did not err in holding that Guam United did not mitigate its damages.

[29] APL's willingness to negotiate a contract with Guam United was evident from the beginning of the negotiations. This willingness was evidenced by the President of APL's letter to Mack on March 18, 1993, which provided:

> It is our sincere intent to open and complete negotiations with Mr. Joe Fang for the improvements and rental of his property located within the Port Authority of Guam. . . . *It is our desire to obtain a long-term relationship with Mr. Fang's organization*
> . . . .
> I will make myself and our organization available to discuss at length and negotiate as needed all the potential terms/conditions of this contract. *We are prepared to move quickly to conclude a mutually beneficial and acceptable arrangement for both parties*.

DeWitt's Supplemental Excerpts of Record, p. 1 (APL's letter to Mack, March 18, 1993) (emphasis added). Another facsimile dated June 15, 1993 from APL's President to Mack also illustrates the effort that was being made to lease the premises. *See* DeWitt's Supplemental Excerpts of Record, p. 2 (APL's

facsimile to Mack, June 15, 1993) (expressing that "Meeting went well & offer to be made to Joe Fang tomorrow.").

[30] Accordingly, the trial court properly construed APL and Ambyth's July 13, 1993 "Letter of Intent" as valid offer to lease the premises[15] because it stemmed from several months of negotiations from a third-party who expressed willingness to finalize a deal. However, the lease never materialized because Guam United counter-offered, asking for a greater monthly payment of $29,000.00. *See O'Brien v. Black*, 648 A.2d 1374, 1376-1377 (Vt. 1994) (finding that the landlord's "decision to refuse to entertain a prospective tenant and to pursue a national tenant," was to the landlord's detriment).

[31] Although Guam United asserts that "the record is devoid of any evidence to support that the conclusion that the proposed increase in rent (approximately $2,000.00) for a different space with additional options was a 'deal breaker' in the negotiations. . . .," Guam United's Cross-Appellant's Brief, p. 20, the following facsimile from APL's President to Mack demonstrates to the contrary:

> Pat,
> Quick not [sic] to let you know we are still in Negotiations with Joe on the above property. *He is now asking $29,000 per month with 3% increase per year on 10 year lease*. He

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[15] Specifically, the letter of intent provides in pertinent part:

> Further to our letter dated June 15, 1993 regarding the subject lease of Guam United Warehouse Corporation's (GUWC) warehouse/office and outside yard space. *This is to confirm the intention of Ambyth Shipping and Trading, Inc. and American President Lines, Ltd. to enter into a real property lease agreement with GUWC*, pursuant to the following:
>
> > Area Requirement: Inside warehouse space = 10,000 sqft.: Outside Yard Space= 120,000 sqft.: Ground floor office.
> > Lease Payment: USD $27,000 per month with a three percent (3%) increase per year.
> > Lease Term: Ten (1) year lease agreement.
> > Conditions: Lessee retains right to sub-lease all or portions of said facility: Lessee is granted the right of first refusal to lease from GUWC all or a portion of the remaining 20,00 sqft. Inside warehouse space at 1.25 per sqft. per month.
>
> Kindly submit GUWC's proposed lease agreement contract for our review. Subject contract should specifically reference / diagram the actual area (s) included under the lease agreement.

DeWitt's Supplemental Excerpts of Record, pp. 3-4 (Letter of Intent, July 13, 1993).

> also wants 20,000 sft of yard to give to other tenants that use the warehouse. *To say least I am getting more and more concerned he does not want to do anything*. He continues to work on the reefer warehouse and the place is still wide open to the public. *I'm lost as to what we can or need to do next, I am getting tired of this chase yourself drill we seem to be conducting. . . .*

DeWitt's Supplemental Excerpts of Record, p. 5 (APL's facsimile to Mack, July 19, 1993) (emphasis added).[16] In view of APL's valid offer and Guam United's decision to counter-offer at a higher price, Guam United has not met its burden to show due diligence that it mitigated its damages. *See Finish Line, Inc. v. Jakobitz*, 557 N.W.2d 914, 915 (Iowa App. 1996) ("Reasonable diligence may require more out of a landlord in some situations than in others."); *J.M. Grimstand, Inc. v. Scangraphics, Inc.*, 539 N.W.2d 732, 734 (Iowa App. 1995) (finding that the landlord did not demonstrate reasonable diligence when it failed to take affirmative steps to procure a prospective tenant, who expressed interest in the property;). Therefore, the trial court did not err in holding that Guam United did not mitigate its damages.

3. Costs of Repairs Performed by Quality Builders

[32] Next, Guam United argues that the trial court erred in denying it the full amount of the cost of repairs performed by Quality Builders. The standard of review "where a party asserts that the damages awarded under breach of contract are inadequate is that [the court] will not reverse if the award is within the scope of the evidence before the trial court." *Tomahawk Village Apt. v. Farren*, 571 N.E.2d 1286, 1295 (Ind. App. 1991) (citations omitted). In making such a determination, the reviewing court "will not reweigh the evidence nor judge the credibility of witnesses." *Id*.

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[16] Guam United itself was very well aware of the fact that its property was sought after because after all, as expressed by Fang, "This is the only warehouse available at the port." DeWitt's Supplemental Excerpts of Record, p. 6 (Fang's Letter, July 31, 1993).

[33] In the present case, Guam United is seeking compensation in the amount of $90,386.26 on repair work for damage that was allegedly caused by DeWitt.[17] The trial court awarded Guam United only $25,000.00 because this was the only amount that the trial court could determine was used for repair work and not improvement on the premises.[18] To demonstrate how much it expended on repair work, Guam United submitted the invoices from Quality Builders (totaling $90,386.26) and offered the testimony of Quality Builder's Project Manager, who purportedly differentiated the repair versus the improvement work. *See* Guam United's Excerpts of Record, pp. 90-126 (Quality Builders Invoices). These two sets of evidence do not demonstrate the amount of damage done by DeWitt. First, while the invoices illustrate the amount of the work done and the various materials used, they fail to describe the type of work done. For instance, some of the invoices were described as "Improvements to Cabras Warehouse" or "Work at Guam United Warehouse" (*see* Guam United's Excerpts of Record, pp. 90, 91, 103, 106 (Quality Builders), and yet several were described as just "Labor" with nothing more (*see* Guam United's Excerpts of Record, pp. 93, 95, 96, 98, 100, 101, 102, 104, 105, 107, 114, 115, (Quality Builders). The trial court

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[17] Paragraph 13 of the new Management Agreement, entitled Use, Waste, Repair and Upkeep, provides:

> Manager acknowledges that the premises, all improvements, have been received by Manager in good condition. Upon the termination of this agreement, Manager shall reinstate the premises to its original and intended use, and in working order and good condition for such use. Manager shall see that the premises and improvements are maintained in a good condition, repair and order at all times at its expense. Manager shall see that the premises and improvements do not fall into a state of disrepair. Manager shall be responsible to maintain the entire premises in good condition and repair at all times. Once the repairs on said list are repaired, Manager shall maintain it in good condition and repair at all times. What constitutes a good condition, state of repair or order shall be determined by Owner in its sole discretion.

DeWitt's Excerpts of Record, tab L, p. L6 (new Management Agreement). In its decision and order, the trial court noted that the parties had agreed during negotiations of the new Management Agreement that DeWitt would pay $57,064.00 in repairs. The amount of $90,386.26 is in addition to the $57,064.00. DeWitt's Excerpts of Record, tab D, p. D12 (Decision and Order).

[18] The $25,000.00 stemmed from the following charges (1) $20,00.00 (for repair to the office area, which included replacement an air conditioning system) and (2) $5,000.00 (for repairs to the main door). DeWitt's Excerpts of Record, tab D, p. D14 (Decision and Order).

correctly noted "that the [invoices] provided by Quality Builders, do not itemize or characterize the labor provided or the work performed as being repairs based upon the damages caused directly by [DeWitt]." DeWitt's Excerpts of Record, tab D, p. D13 (Decision and Order). *See Poesy v. Closson*, 374 P.2d 710 (Idaho 1962) (holding that "it was obligation of landlord to prove extent of damages *with reasonable certainty*, and in absence of competent evidence to sustain such burden, there could be no recovery for alleged failure of tenant to surrender premises in as good a condition as when received."); *see also Missouri Baptist Hosp. v. United States*, 555 F.2d 290 (Ct. Cl. 1977) (noting that "the plaintiff is not to be put in a better position than it would have been if the defendant had performed the terms of the lease.") (citations and quotations omitted).

[34] Second, Eric Mines' testimony was insufficient to delineate which items on the invoices were for repair work and which were for the overall improvement of the premises.[19] We find Mines' testimony unconvincing since he performed the work over eight years from the time of trial. *See* Transcript, p. 158 (testimony of Eric Mines, Bench Trial, January 29, 2002) (expressing "I can't state definitely that it was [related to repairs], but based on the way we used to do things, my best - - to the best of my knowledge, it would have been for the repairs."); *see also Poesy v. Closson*, 374 P.2d 710 (Idaho 1962) (noting that "evidence is incompetent to establish the damages for failure of the tenant to deliver the premises in as good condition as when received, excepting normal wear and tear, as there was no proof that the action of the tenant resulted in such gross damage as to require a complete reconstruction of the interior of the home.").

[35] In light of Guam United's failure to prove with reasonable certainty that the charges on the invoices were for repair and not for the improvement on the property, the trial court did not err in denying Guam United the full amount on Quality Builder's invoices.

[19] Eric Mines did not testify at trial, rather his deposition was read into the record during trial.

4. Simple v. Compound Interest

[36] Guam United also claims that the trial court erred by awarding simple interest and not compound interest on the judgment. DeWitt argues that the trial court correctly awarded prejudgment interest at the simple interest rate of 6%. Because the parties do not dispute when interest should be calculated or the rate it should be calculated at, the issue on appeal is confined to whether the trial court properly granted *simple* prejudgment interest rather than *compound* interest. As we noted in a previous section, the standard of review for a lower court's award of interest is an abuse of discretion. *Sumitomo Construction Co., Inc.*, 2001 Guam 23 at ¶ 7; *see Pabst*, 228 F.3d at 1136.

[37] In the case at bar, the trial court awarded simple interest at a rate of six (6) percent for all damages award.[20] A review of the Guam Code Annotated and caselaw reveals that the trial court did not err in this regard. "As a general rule compound interest is not favored by the law and is generally allowed only in the presence of a statute or an agreement between the parties allowing for compound interest." *Campbell v. Lake Terrace, Inc.*, 905 P.2d 163, 165 (Nev. 1995); *Nation v. W.D.E. Elec. Co.*, 563 N.W.2d 233, 235 (Mich. 1997) (citations and quotations omitted); *Norman v. Norman*, 506 N.W.2d 254, 255 (Mich. App. 1993). In fact, "[t]he common law has long favored simple interest and disfavored compound

[20] The trial court's judgment stated "[Guam United] is granted judgment against [DeWitt] in the principal amount of $169,220.87 with interest accruing at the legal rate of six (6%) percent as follows until fully satisfied:

a) $26,680.00 commencing May 4, 1993;
b) $26,680.00 commencing June 4, 1993;
c) $26,680.00 commencing July 4, 1993;
d) $1,334.00 commencing March 4, 1993;
e) $1,334.00 commencing April 4, 1993;
f) $1,334.00 commencing May 4, 1993;
g) $57,064.00 commencing July 4, 1993;
h) $25,000.00 commencing July 4, 1993
i) $3,114.87 commencing July 4, 1993.

Excerpts of Record (Judgment).

interest, which it has characterized as interest on accrued interest." *Nation v. W.D.E. Elec. Co.*, 563 N.W.2d 233, 235 (Mich. 1997) (citations and internal quotations omitted). Thus "*when no specific provision for interest is noted*, then simple interest is to be awarded." *State ex rel. City of Elyria v. Trubey*, 484 N.E.2d 169, 170 (Ohio App. Ct. 1984) (emphasis added).

[38] On Guam,[21] the statute, Title 18 GCA § 47106, which governs the rate of interest on judgments, does not prescribe the awarding of compound interest. Section 47106 provides in relevant part:

> The rate of interest upon the loan or forbearance of any money, goods or things in action, or on accounts *after demand or judgment rendered in any court of the territory, shall be six percent (6%) per annum* but it shall be competent for the parties to any loan or forbearance of any money, goods or things in action to contract in writing for a rate of interest not exceeding the rates of interest specified in Title 14 of this Code.

Title 18 GCA § 47106 (emphasis added). The silence of a statute to specifically allow for compound interest "means that the interest shall be calculated on the basis of simple interest rather than compound interest in the absence of some special circumstance dictating otherwise." *Norman v. Norman*, 506 N.W.2d 254, 256 (Mich. App. 1993); *see State ex rel. City of Elyria v. Trubey*, 484 N.E.2d 169, 170 (Ohio App. Ct. 1984) ("Here, there was no statutory provision which would permit the compounding of interest.").

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[21] Guam United incorrectly argues that Title 20 GCA § 2110 "mandates that interest pre-judgment should compound on all specific amounts, made certain, from the dates found to be due and owing." Guam United's Cross-Appellant's Brief, p. 6. Title 20 GCA § 2110, entitled "Persons entitled to Damages also entitled to Interest," provides:

> Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him, upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt.

Title 20 GCA § 2110 (19__). Section 2110 does not mandate the awarding of compound interest, rather section 2110 addresses when a party should be allowed interest. Moreover, Title 20 GCA § 2112 specifically notes that "[a]ny legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, *until the contract is superseded by a judgment* or other new obligation." Title 20 GCA § 2112 (emphasis added).

[39] Additionally, not only is there an absence of an express allowance for compound interest, but section 47106 specifically utilizes the limiting words of "per annum," which further evidences a simple interest calculation. *See City of Hildale v. Cooke*, 28 P.3d 697, 707 (Utah 2001) (noting the distinction between '8% per annum,' and '8% per annum, compounded annually' and finding that "interest on a judgment should be calculated simply unless agreed to otherwise by the parties.").; *See Fuller v. White*, 201 p.2d 16, 19 (Cal. 1949) (per annum-monthly to be construed as simple interest).; *Metropolitan Property & Liability Ins. Co. v. Ralph*, 640 A.2d 763, 767-768 (N.H. 1994) (rejecting party's contention "that the term 'annual rate' in [statute] is synonymous with compounding" and noting that [o]ther have held that "per annum," "per year," or "annual rate" provides for simple interest."); *Norman v. Norman*, 506 N.W.2d 254, 256 (Mich. App. 1993).

[40] Accordingly, the trial court did not err in awarding simple interest on the award.

5. Reasonable Rent for DeWitt's Occupancy of the Cold Storage Unit

[41] The next issue raised on cross-appeal is whether the trial court properly denied awarding Guam United rental fees on the cold storage for four months. Guam United asserts that per the new Management Agreement and the parties' communication, DeWitt was required to pay rent if it did not vacate the cold storage unit by December 31, 1992. The trial court found rental fees on the cold storage unwarranted because DeWitt had already abandoned the premises by March and the new Management Agreement was not executed by Guam United until February 23, 1993. "Factual determinations are reviewed for clear error." *Yang v. Hong*, 1998 Guam 9, 4. "Findings of fact made by a judge after a bench trial are subject to the clearly erroneous standard of review." *Id.* "In considering whether the evidence is sufficient to sustain the trial court's judgment," the reviewing court "examines the evidence in the light most favorable to the successful party, resolving any controverted fact in favor of the successful party, and the successful party will have the benefit of every inference reasonably deducible from the evidence." *S.N. Mart, Ltd.*

v. Maurices Inc., 451 N.W.2d 259, 261 (Neb. 1990) (citations and internal quotations omitted); *O'Brien v. Black*, 648 A.2d 1374, 1377 (Vt. 1994). For the following two rationales, the trial court did not err in denying Guam United's request for rental fees on the use of the cold storage.

[42] First, based upon the trial court's finding, the new Management Agreement was not formally executed until February 23, 1993, the date when Guam United finally signed the new Management Agreement. Thus, the terms of new Management Agreement, including the section governing the cold storage usage,[22] became effective only on February 23, 1993. Before the execution of the new Management Agreement, DeWitt's contract with Guam United remained at the month-to-month tenancy basis. Under this month-to-month agreement, Guam United did not have to pay for the cold storage rental. Additionally, the trial court found (and Guam United does not controvert in its appellate briefs) that Fang admitted during trial that DeWitt abandoned the premises on March. Consequently, Guam United's access to the cold storage was not impeded by DeWitt during the time DeWitt no longer had the privilege to use the cold storage pursuant to the new Management Agreement.

[43] Second, we disagree with Guam United's contention that the December 29, 1992 letter evidenced DeWitt's obligation to pay for the cold storage. The December 29, 1992 letter begins with "When we were on Guam last week, I spoke to Jerry Ingling [sic] *about resolving the following issues before we can execute the lease which you had already signed*." DeWitt's Excerpts of Record, tab M, p. M1

[22] Specifically, paragraph 23 of the new Management Agreement, provides that:

> Operation of (3) Cold Storage Rooms: Manager recognizes that part of the warehouse, namely the three cold storage rooms at the north-west corner of the building, occupying a total area of approximately 10,000 square feet, shall be operated by a third party to be appointed by the Owner. This section of the building, as well as the yard directly in front of it, have been specifically excluded from the Agreement. Manager agrees not to interfere with the operation of this section.

DeWitt's Excerpts of Record, tab L, p. L9 (Management Agreement).

(December 29, 1992 letter, Joe Fang). We find that the letter more reflects the parties failure to resolve the issues outlined in this letter, and not DeWitt's acquiescence to the terms of the letter. In fact, DeWitt has consistently argued that the December 29, 1992 letter was a counteroffer that they never accepted. Consequently, this letter cannot be used as evidence of the parties' agreement that DeWitt would pay for the rental space on the cold storage.

[44] Accordingly, we find that the trial court did not err in denying Guam United award for the usage of the cold storage.

6. Undisclosed Witness

[45] The last issue we address is whether the trial court erred in permitting the testimony of expert witness John Scragg on behalf of DeWitt. "[A] trial court's decision on the admissibility of expert testimony is reviewed for an abuse of discretion or manifest error." *B.M. Co. v. Avery*, 2001 Guam 27, ¶ 20 (quoting *In re N.A.*, 2001 Guam 7, ¶ 19); see also Duenas v. Yama's Co., Civ. No. 90-00062A, 1991 WL 255834, at *3 (D. Guam App. Div. Nov. 18, 1991). "A trial judge abuses his [or] her discretion . . . when the decision is based on an erroneous conclusion of law or where the record contains no evidence on which the judge could have rationally based the decision." *Id.* In determining whether a trial court has abused it discretion, "a reviewing court does not substitute its judgment for that of the trial court," rather the court "must first have a definite and firm conviction the trial court, after weighing relevant factors, committed clear error of judgment in its conclusion." *Id.* (quoting *People v. Tuncap*, 1998 Guam 13, ¶ 12).

[46] This court has previously addressed whether a trial court properly admitted or excluded the testimony of an expert witness in *B.M. Co. v. Avery*, 2001 Guam 27, which held that the trial court abused its discretion when it failed to permit the testimony of two expert witnesses who were disclosed only two weeks before trial. In *B.M. Co.*, this court outlined the following factors in ascertaining whether a trial court has abused its discretion in excluding a witness:

> (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified, (2) the ability of that party to cure that prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court, and (4) bad faith or willfulness in failing to comply with the court's order.

B.M. Co., 2001 Guam 27 at ¶ 24. In addition to the above factors, the importance of the underlying testimony that a witness has to offer is another factor that the court considers. *Id*.

[47] In the instant case, the trial judge asked DeWitt to identify its witnesses on the issue of damages during trial. DeWitt identified two individuals, but did not include John Scragg (hereinafter "Scragg"). However, one month after the trial court's inquiry (and after a one month break from trial), DeWitt called Scragg as its rebuttal witness,[23] to challenge Guam United's requests for damages incurred in the removal ($18,000.00) and replacement ($164,700.00) of the cold storage panels on the warehouse. Specifically, Scragg rebutted Fang's previous testimony that the panels could not be repaired and instead, needed to be completely replaced. On appeal, Guam United contends that the trial court erred in allowing Scraggs to testify because (1) they received "no notice of [] Scragg as DeWitt's expert witness on damages until the very day he testified," and (2) they were unable to effectively cross-examine Scraggs since his "testimony was based, in great part, upon a report that he no longer possessed." Opening Brief of Cross-Appellant Guam United, p. 32. As the following paragraphs explain, we find that the trial court did abuse its discretion in allowing Scraggs to testify.[24]

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[23] "Scraggs testified at one point in time, he made repairs to the cold storage facility of the wall panels were still intact but there were severe damages on the damaged units. Moreover, he testified the roof didn't need to be touched." DeWitt's Excerpts of Record, tab D, p. D15 (Decision and Order).

[24] We note that the record is devoid of any information on whether DeWitt violated any discovery orders by not revealing the name of Scraggs when it should have. A bulk of the caselaw which address undisclosed witnesses, focus on the failure to reveal the witness during the pre-trial stages. *See Gonzalez v. Stevenson*, 791 S.W.2d 250, 253 (Tex. App. Ct. 1990) ("The sanction for failing to respond to interrogatories is the automatic exclusion of the unidentified witnesses' testimony. However, if the trial court finds that the party had good cause for failing to answer the interrogatories, it may, in its discretion, admit the testimony.); *Johnson v. Nat'l Super Markets, Inc.*, 710 S.W.2d 455, 456 (Mo. App. 1986). ("The trial court is vested with broad discretion to admit or reject testimony of a previously undisclosed witness whose identity may have been requested by interrogatory, and this court reviews only for abuse of that

[48] Guam United made the proper objections on trial regarding the fact that Scraggs was an undisclosed witness.[25] Here, DeWitt does not dispute the fact that Scragg's identification was revealed only in the middle of trial, right before he was called to testify. This case is therefore distinguishable from the previous *B.M. Co*. case where the undisclosed witnesses were revealed two weeks before trial commenced. Moreover, DeWitt fails to explain the reason for their failure to reveal Scragg's identification in a more timely manner. As expressed in *King Pest Control v. Binger*, 379 So.2d 660 (Fla App. 1980):

> [R]egardless of the vehicle used to obtain names of pertinent witnesses, the policy behind the rules to disclose the names of witnesses is to eliminate surprise, to encourage settlement, and to assist in arriving at the truth. . . . . To paraphrase one court, trial by ambush is a thing of the past, ... litigation should no longer proceed as a game of 'blind man's bluff'

King Pest Control v. Binger, 379 So.2d 660, 662 (Fla App. 1980) (citations and internal quotations omitted).

[49] Additionally, had DeWitt been more forthcoming during the trial court's inquiry, Guam United would have had the opportunity to prepare for Scragg's cross-examination for approximately one month (as a result of the break that occurred during trial) and therefore cure any prejudice, which occurred as a

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discretion.").

[25] MR. MAHER: Your Honor, I forgot one… I had kind of had objection to their undisclosed witnesses, and you indicated I should just raise it –
THE COURT: I know. I know.
MR. MAHER: -- as they come on.
THE COURT: Right.
MR. MAHER: So, I just – for the record John Scraggs is here, he was not disclosed in support of their case and, so, that's my objection.
THE COURT: All right. Noted for the record. The objection is noted for the record as to this witness.
MR MAHER: Yes. And I will be periodically doing that as each new witness appears.
THE COURT: Okay. We didn't do that for Yingling, though.
MR. MAHER: I anticipated Mr. Yingling because he's a part of –
THE COURT: Okay, all right. I just wanted to make sure that you knew that.

Transcripts pp. 32-34 (Bench Trial, Feb. 27, 2002).

result of Scragg's late identification without necessarily "disrupt[ing] the orderly and efficient trial of the case." *B.M. Co.*, 2001 Guam 27 at ¶ 24; *see Montoya v. Super Save Warehouse Foods*, 804 P.2d 403, 406 (N.M. 1991) ("Only rarely could a court commit reversible error in the exercise of discretion in allowing a witness to testify, *notwithstanding the failure to give timely notice of the witness, and notwithstanding the questionable use of a witness in rebuttal when the testimony arguably should have been forthcoming in the case in chief*.") (emphasis added). It is, therefore, difficult to dispute Guam United's contention that they were prejudiced by Scragg's testimony especially since the weight of Scragg's testimony was highly considered by the trial court as evidenced in its decision and order. *See King Pest Control v. Binger*, 379 So.2d 660, 662 (Fla App. 1980) ("Prejudice, of course, does not mean that the witness will testify favorably to the side calling him. Rather, *it means that the objecting party might well have taken some action to protect himself had he timely notice* of the witness and that there exist no other alternatives to alleviate the prejudice. . . .") (emphasis added).

[50] Under the circumstances presented in this case, the trial court abused its discretion when it allowed Scraggs to testify as DeWitt's rebuttal witness. Accordingly, we remand this case, not for a new trial, but for the trial court to redetermine, with the exclusion of Scragg's testimony, the amount of DeWitt's liability on the damaged cold storage panels.

IV.

[51] We hold that the trial court did not err in holding that a valid and binding contract existed between the two parties. We also hold that the trial court did not err in awarding simple interest, rather than compound interest on the award, denying rental fees on the cold storage unit, finding that Guam United did not mitigate its damages, and denying the full amount expended to Quality Builders. However, we find that the trial court erred in awarding pre-judgment interest on DeWitt's security deposit. We similarly find that

the trial court abused its discretion when it allowed an undisclosed expert witness to testify, and **REMAND** this issue for the trial court to make a determination, excluding the testimony of the undisclosed expert witness, on the amount of damages to the cold storage panels. The trial court's Judgment is **AFFIRMED** in **PART** and **REVERSED** in **PART**.

[52] Each party will bear its own costs and attorneys fees on appeal.