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Court of Appeal,
Second District, Division 3, California.

LEWON INVESTMENTS, L.P., et al.,
Plaintiffs, Cross-Defendants and Appellants,
v.
GOLDEN GLOBE ENTERPRISES, INC., et al.,
Defendants, Cross-Complainants and Respondents.

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As Modified December 14, 2012

APPEAL from a judgment and order of the Superior Court of Los Angeles County, C. Edward Simpson, Judge. Affirmed. (Los Angeles County Super. Ct. No. GC040233)

**Attorneys and Law Firms**

Haight Brown & Bonesteel, Rita Gunasekaran; Hansen Seto, Raymond J. Seto and Harvey M. Horikawa for Plaintiffs, Cross-defendants and Appellants.

Morris Polich & Purdy, Jens B. Koepke; Law Offices of John S. Chang and John S. Chang for Defendants, Cross-complainants and Respondents.

**Opinion**

KLEIN, P.J.

***1** Plaintiff and cross-defendant Lewon Investments, L.P., a California limited partnership, and cross-defendants Lewon Management Corporation (Lewon), William Wong and Doris Wong (the Wongs) (collectively, Lewon or the Lewon parties), appeal a judgment awarding $386,766 to their lessee, defendant, cross-complainant and respondent Golden Globe Investments, LLC (GG LLC) following a jury trial.

The Lewon parties also appeal a postjudgment order awarding attorney fees in the sum of $343,312 to the prevailing parties, namely, GG LLC as well as defendants and respondents Golden Globe Enterprises, Inc. (GG Inc.), Kim Bang Ly and Susan Ngoc Minh Ly (the Lys) (collectively, GG or the GG parties).

In this commercial lease dispute, the issues presented include the enforceability of a rent recapture provision which would have required GG, the lessee, to repay about $1.6 million in rent concessions in the event of a breach of the lease. We conclude the trial court correctly held the rent recapture provision failed to pass muster as proper liquidated damages. We also do not perceive error in the trial court's other rulings and affirm both the judgment and the attorney fee order.

## FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*
In 1983, Lewon leased the subject real property, located at 127 North Garfield Avenue in Monterey Park, to GG Inc. for a period of ten years, with the Lys serving as guarantors of the lessee's obligations. GG Inc. subsequently merged with GG LLC, with GG LLC as the surviving entity.

Previously, the property had been a skating rink but was vacant. GG invested $700,000 in 1983 to remodel the premises as a retail complex. GG improved the building, adding 10,000 square feet, substantially increasing its market value. As improved by GG, the building has 31,716 square feet of leasable area.

GG utilized about 75 percent of the premises as an Asian market, known as the Hong Kong Supermarket. GG subleased the remaining 25 percent of the space to twelve smaller satellite businesses. Lewon received a fixed monthly rent from GG, while GG received rent from its sublessees.

In 1993, Lewon and GG executed another 10–year lease, commencing at a base rent of $38,035 per month and rising to $61,816 by the end of the lease term.

GG subsequently requested a rent reduction because the business was not doing well. In 1999, the parties executed a First Amendment to Lease, giving the lessee a “Conditional Rent Concession,” reducing the monthly base rent to $48,500 for two years, from March 1, 1999 through February 28, 2001.

  

The agreement provided that in the event the lessee failed to pay any installment when due or otherwise failed to perform any term or condition of the lease, all conditionally forgiven base rent would be immediately due and payable as additional rent.

GG subsequently requested another rent reduction in order to improve the building. In 2001, the parties entered into a Second Amendment to Lease (second amendment), extending the term of the lease to March 31, 2008, and lowering the base rent on a conditional basis for the duration of the lease. [1] The rent reduction was conditioned, among other things, on lessee's completing new leasehold improvements of at least $250,000 by a date certain. The second amendment similarly provided that in the event the lessee failed to pay any rental installment when due, or otherwise failed to perform any term or condition of the lease, all conditionally forgiven rent would be immediately due and payable as additional rent.

***2** It was undisputed that during the 25 years that GG was a lessee, it always paid the rent on time. Lewon also was satisfied with GG's remodeling of the premises. [2]

Pursuant to a September 26, 2002 agreement, GG sold for $5 million the business assets of Hong Kong Supermarket (which now consisted of three grocery stores, including the Monterey Park location), to Jeffrey Wu and Anh Tran. In conjunction with the sale, GG entered into a sublease agreement with Wu and Tran for the supermarket space (not the subtenant spaces). Wu and Tran then assigned their interests under the sublease to a new entity, Hong Kong Supermarket of Monterey Park, Ltd. Said assignment specifically referred to the "Sale of Business Assets" of the business known as Hong Kong Supermarket to purchasers Wu and Tran.

Lewon, which was the master landlord, formally consented to the sublease, in a document entitled "Second Addendum and Master Landlord's Consent to Sublease," which Lewon signed on September 29, 2003. [3]

The 1993 lease, like the 1983 lease, gave Lewon the right of first refusal to purchase the property. The 1993 lease also had two option periods, for five years each, so if GG had the right to exercise both options and if it did exercise both options, the lease would not expire until March 2018. However, in the event of a default by GG, it could be precluded from exercising its option.

In 2006, the Wongs met with a developer, John MacLaurin, and they discussed redeveloping the subject property into a mixed-use property, with commercial space on the lower level and residential units on the upper floors. However, in March 2006, MacLaurin advised the Wongs that "this talk about development is ... useless" unless they could "get rid" of Ly's right of first refusal, under the master lease, to purchase the property.

In 2006, after 25 years of being represented by Feingold, Lewon hired a new attorney, Raymond Seto, who began writing letters to GG asserting it was in breach of various provisions under the 1993 lease. Lewon asserted, inter alia, GG was underinsured. Lewon then purchased additional coverage and billed GG, which paid the $18,395 bill from the insurance company. Lewon also complained that GG was not complying with the lease requirement that it obtain Lewon's consent when it subleased space to its various subtenants.

***3** On July 13, 2007, more than eight months before the lease's expiration date of March 31, 2008, GG gave notice to Lewon that it was seeking to exercise its option to renew the lease for another five years, through March 31, 2013. Lewon refused, taking the position that GG did not have the right to exercise the option because of "too many defaults."

On October 16, 2007, with the enforceability of the option unresolved, Lewon sent a letter to each subtenant advising them that GG's lease would expire on March 30, 2008, and that after that date they must tender their performance, including payment of rents, directly to Lewon. Lewon sent another letter on March 13, 2008, reiterating its position and offering to enter into a deal directly with the subtenants after the existing master lease expired on March 31, 2008. As a result of these letters, Lewon collected $58,262.99 in rent directly from various subtenants, including Hong Kong Supermarket, for March 2008, the final month of the lease term.

2. *Proceedings.*

a. *Lewon's complaint for damages and declaratory relief; Lewon sought to recover the conditionally forgiven rent and to preclude GG from exercising its renewal option.*

On January 23, 2008, Lewon filed suit against GG Inc., GG LLC, and the Lys, pleading a cause of action for

  

breach of contract and a cause of action for declaratory relief. Lewon alleged GG breached the lease by failing to maintain sufficient insurance coverage, failing to maintain the premises, failing to inform Lewon of proposed subleases and obtain its consent for those subleases, and misrepresenting the transaction with Wu and Tran as a "merger." Lewon asserted that due to GGs's "numerous material breaches," Lewon was entitled to payment from GG of all conditionally forgiven rents, amounting to $1,549,876. The declaratory relief claim sought a judicial determination that GG had no right to exercise the option to renew the lease.

b. *GG's answer and cross-complaint; GG alleged Lewon's motive was to eliminate GG's tenancy so as to enable Lewon to sell or redevelop the premises.*

GG filed an answer and cross-complaint against Lewon and the Wongs. GG pled Lewon breached the implied covenant of good faith and fair dealing by declaring a pretextual breach of the lease so as to deprive GG of its right to exercise the option to renew the lease and its right of first refusal to purchase the property. GG pled "none of the claimed breaches were material and none threatened the security or value of the Premises, or exposed Lewon Parties to any costs or expenses. In fact, all the claimed breache[s] were satisfactorily resolved."

GG also pled causes of action against Lewon for tortious interference, based upon Lewon's letters to the subtenants telling them the lease would expire on March 31, 2008, which caused the subtenants to enter into leases directly with Lewon and to refuse performance to GG.

c. *The parties stipulate to binding arbitration in order to determine the rental rate for the option period; arbitrator sets rental rate for the option period at $2.21 per square foot, above the ceiling amount GG was willing to pay.*

The operative lease provided for an appraisal procedure if the parties were unable to agree on a new minimum base rent for the option period.

In September 2008, after the onset of litigation, the parties entered into a stipulation to submit the issue of the amount of fair rental value to binding arbitration. In the stipulation, the parties "acknowledge[d] and agree[d] that their entry into this stipulation is for the *sole and exclusive purpose of determining the minimum Base Rent for the Option Period* and the outcome of such arbitration ... shall have no force or effect on the issue of whether or not [GG Inc.] is entitled to exercise its renewal option under the terms of the lease." (Italics added.)

***4** The stipulation further provided that GG shall, prior to the issuance of the award, notify Lewon's counsel of the "ceiling amount" which GG would consider to be acceptable. In the event the arbitrator's award exceeded the ceiling amount, the lease shall be deemed terminated as of April 1, 2008. Further, in the event the newly determined base rent was above the ceiling amount, "the Arbitrator shall also make a determination as to whether or not the minimum Base Rent payable by [GG] to [Lewon] for the period between April 1, 2008 and the date of the Arbitrator's award shall be at the newly determined Base Rent or at the minimum Base Rent in effect during the last month of the Lease Term."

Pursuant to the stipulation, on September 26, 2008, GG notified Lewon that the ceiling amount of the rent it was willing to pay was $2.20 per square foot. On October 6, 2008, the arbitrator issued an award which set the rent one penny higher, at $2.21 per square foot. Accordingly, under the terms of the stipulation, the lease was terminated, effective April 1, 2008.

On June 25, 2009, after receiving additional briefing with respect to the rental rate for the post-termination period (April 1, 2008 to October 6, 2008), the arbitrator issued an amended award setting the rental rate at $2.21 per square foot for the post-termination period. The arbitrator did not award any damages to either party, as that was not stipulated to by the parties, but simply stated the rent payable by GG for the post-termination period "shall be based on the foregoing newly-determined minimum Base Rent, "not the rental rate which was in effect during the last month of the lease term. [4]

d. *Trial*.

In March 2010, nearly a year after the conclusion of the arbitration proceeding, the matter came on for a jury trial. At issue were Lewon's cause of action for breach of contract and GG's causes of action for breach of the implied covenant of good faith and fair dealing and interference with contractual relations, asserted in GG's cross-complaint.

  

(1) *Grant of nonsuit in favor of GG on Lewon's attempt to enforce the rent recovery provisions.*

GG moved for nonsuit on the rent recapture provisions. GG asserted Lewon was not damaged by any of GG's alleged breaches of the lease (i.e., failure to obtain consent to small sublessees; "concealment" of sale to Wu; failure to repair roof; and lacking sufficient insurance coverage).

GG's nonsuit motion further contended that Lewon's attempt to recover damages for the "forgiven" rent was barred because it constituted an illegal penalty and a forfeiture. The trial court granted GG's nonsuit with respect to the rent recovery provisions, stating "the rent recovery provisions of the first and second lease amendment[s] ... are an illegal form of liquidated damages."

(2) *Denial of Lewon's motion for nonsuit on GG's cross-complaint.*

Lewon, in turn, moved for nonsuit on GG's claim for interference with contract, arguing GG had failed to establish damages.

GG argued it had shown damages in that due to Lewon's interference, the sublessees ceased paying rent to GG prior to the lease expiration date.

The trial court denied Lewon's nonsuit motion, stating "there is evidence of damages. It will be up to the jury to decide credibility."

(3) *Special verdicts.*

On March 30, 2010, the jury returned a series of special verdicts. On Lewon's complaint for breach of contract, the jury found GG had not done "all, or substantially all, of the significant things that the contract required it to do." The jury awarded Lewon damages against GG in the sum of $30,060.35. The damages figure was the exact amount Lewon was billed by Royal Roofing Company for a 2009 roof repair to the premises.

***5** On GG's cross-complaint, the jury found Lewon intended to disrupt the performance of the sublessees, and awarded GG damages in the sum of $58,262.99. This amount was the exact sum Lewon collected from GG's sublessees during the month of March 2008, while the lease was still in effect.

The parties agreed to jointly submit a net judgment.

e. *Proceedings relating to entry of judgment.*

The parties failed to agree on a joint judgment.

On April 2, 2010, Lewon filed a petition to confirm the arbitration award and for entry of judgment in conformity with the award. Lewon contended GG's net monetary judgment from the verdicts ($28,202.64) should be offset by the arbitrator's award of $434,120.40 in rent payable by GG to Lewon for the post-termination period between April 1, 2008 and October 6, 2008 (based on the rental rate of $2.21 per square foot). Based thereon, Lewon contended it was entitled to a net judgment of $405,922.80.

GG, in turn, citing the arbitration stipulation, argued the arbitrator did not, and was not empowered to, make a monetary award to either party. Further, Lewon already had conceded that since April 1, 2008, it had been collecting rents from the subtenants occupying the premises, and therefore Lewon's recovery of post-termination rents from GG would have to be offset by the amount of the rent that Lewon had collected directly from the subtenants during the post-termination period.

GG asserted the recovery of post-termination rent by Lewon ($434,380.60, at $2.21 per square foot) should be offset by (1) the rents Lewon collected from the subtenants during the post-termination period ($538,664.62); (2) the $254,280 security deposit that Lewon retained; and (3) the net damages awarded by the jury ($28,202.64). Applying these setoffs, GG contended it was entitled to a net judgment of $386,766.66.

The trial court granted the motion to confirm the arbitration award and took the matter under submission. On May 12, 2010, the trial court entered judgment in favor of GG in the sum of $386,766.66, consistent with GG's position, and declared GG was the prevailing party.

f. *Subsequent proceedings*.

  

On October 1, 2010, the trial court entered an order awarding attorney fees to the GG parties in the sum of $343,312.34, together with costs of $32,084.16.

The Lewon parties filed timely notices of appeal from the judgment and from the postjudgment order. The appeals were consolidated.

## CONTENTIONS

Lewon contends: (1) reversal of the nonsuit is required because GG failed to refute the presumptive validity of the rent recapture provisions of the commercial lease at issue; (2) the trial court erred in modifying the final arbitration award to reflect a rent setoff of rents allegedly collected by Lewon from the subtenants; (3) the trial court erred in awarding GG the security deposit, which Lewon was authorized by statute to retain; (4) the trial court erred in denying Lewon's motion for nonsuit on GG's cross-complaint because the lease expressly authorized or immunized Lewon's conduct; (5) the trial court committed prejudicial evidentiary error in restricting Lewon's cross-examination of Mr. Ly; and (6) on remand, Lewon should be awarded trial and appellate attorney fees as the prevailing party. [5]

## DISCUSSION

1. *Trial court properly determined the rent recapture provisions were unenforceable.*

***6** As indicated, GG moved for nonsuit on the rent recapture provisions found in the first and second amendments to the lease. GG argued Lewon's attempt to recover damages for the "forgiven" rent was barred because it constituted an illegal penalty and a forfeiture. The trial court granted GG's nonsuit with respect to the rent recovery provisions, stating "the rent recovery provisions of the first and second lease amendment[s] ... are an illegal form of liquidated damages." The trial court's ruling was correct.

### a. *General principles.*

Civil Code section 1671 states in pertinent part at subdivision (b) that a "provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made." Thus, GG, as the party seeking to invalidate the rent recapture provisions, had the burden to show the invalidity of the provisions.

In *Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970, 977 ( *Ridgley* ), the Supreme Court explained: "A liquidated damages clause will generally be considered unreasonable, and hence unenforceable under section 1671(b), *if it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach. The amount set as liquidated damages 'must represent the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained*.' [Citation.] In the absence of such relationship, a contractual clause purporting to predetermine damages 'must be construed as a penalty.' [Citation.] 'A penalty provision operates to compel performance of an act [citation] and usually becomes effective only in the event of default [citation] upon which a forfeiture is compelled without regard to the damages sustained by the party aggrieved by the breach [citation]. *The characteristic feature of a penalty is its lack of proportional relation to the damages which may actually flow from failure to perform under a contract*. [Citations.]' [Citation.] [¶] In short, '[a]n amount disproportionate to the anticipated damages is termed a "penalty." A contractual provision imposing a "penalty" is ineffective, and the wronged party can collect only the actual damages sustained.' [Citations.]" (Italics added.)

### b. *Instant rent recapture provisions failed to pass muster under the Ridgley standard.*

The evidence showed both of the rent recapture provisions were drafted solely by Lewon's counsel, Feingold, and were not the subject of any negotiation or discussions. Feingold testified there were no negotiations or discussion with GG about the type of breach or default which would trigger the rent recapture provision. Nor was there any attempt to quantify what Lewon's damages might be from a breach or default of the lease. As for Mrs. Wong, she testified that in her view, "a default is a default," and there was no discussion about whether a particular default "would likely cause a lot of damages or just a little bit of damages." On this record, the rent recapture provision did not represent a reasonable attempt to estimate the actual anticipated damages that would flow from any of the alleged or actual breaches of the lease.

  

Thus, the $1.6 million rent recapture provision bore no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach. As GG argues, the draconian rent recapture provision was not a reasonable attempt to estimate damages for alleged breaches by GG, such as a failure to seek consent for and provide copies of subleases, for allegedly misrepresenting the transaction with Wu as a "merger," or for underinsuring the property.

***7** Further, notwithstanding Lewon's allegations of various breaches by GG, the only breach for which the jury awarded Lewon any damages was for GG's failure to maintain the roof, for which Lewon was awarded $30,060.35 in damages. The instant $1.6 million rent recapture provision which Lewon was seeking to enforce at trial cannot be deemed an attempt to reasonably estimate anticipated damages flowing from such a breach.

In theory, the only possible breach for which the rent recapture provision might be deemed reasonable would be an ongoing failure by GG to pay rent. However, there is no issue here as to nonpayment of rent; GG always paid the rent timely, and as noted, it paid about $10 million in rent to Lewon during its tenancy.

In sum, the rent recapture provisions clearly failed to satisfy the *Ridgley* standard. Accordingly, the trial court properly held the rent recapture provisions in the first and second amendments to the lease were unavailing to Lewon. [6]

2. *No merit to Lewon's contention the trial court improperly modified the arbitration award; the arbitrator's sole charge was to determine the new rental rate for the premises.*

In calculating the amount of the final judgment, which awarded Lewon $434,380.60 in rent from GG for the post-termination period (April 1, 2008 to October 6, 2008), the trial court gave GG a credit for the amount of rent that Lewon collected directly from the subtenants during said six-month period. Lewon argues "the trial court's permitting a rent setoff, when no such adjustment had been made by the arbitrator, directly affects the intrinsic validity of the award, and is not permitted." ( *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11 [general rule that arbitrator's award cannot be reviewed for errors of fact or law].) The contention is without merit because the issue of rent setoffs was beyond the scope of the submission to the arbitrator.

We begin our analysis with the scope of the stipulation to arbitrate. As indicated, while the enforceability of the lease option was being litigated, the parties entered into a stipulation to submit the issue of the amount of fair rental value during the option period to binding arbitration. In the stipulation, the parties "acknowledge[d] and agree[d] that their entry into this stipulation is for *the sole and exclusive purpose of determining the minimum Base Rent for the Option Period* and the outcome of such arbitration ... shall have no force or effect on the issue of whether or not [GG Inc.] is entitled to exercise its renewal option under the terms of the lease." (Italics added.)

Pursuant to the stipulation, on September 26, 2008, GG notified Lewon that the ceiling amount of the rent it was willing to pay was $2.20 per square foot per month.

On October 6, 2008, the arbitrator issued an award which set the rent one penny higher, at $2.21 per square foot per month. Accordingly, under the terms of the stipulation, the lease was terminated, effective April 1, 2008.

On June 25, 2009, after receiving additional briefing with respect to the rental rate for the post-termination period (April 1, 2008 to October 6, 2008), the arbitrator issued an amended award setting the rental rate at $2.21 per square foot for the post-termination period. The arbitrator did not award any damages to either party, as that was outside the scope of the stipulation, but simply stated the rent payable by GG to Lewon for the post-termination period "shall be based on the foregoing newly-determined minimum Base Rent," rather than the rental rate previously in effect.

***8** Thereafter, Lewon filed a petition to confirm the arbitration award and for entry of judgment in conformity with the award. Lewon contended GG's net monetary judgment from the verdicts ($28,202.64) should be offset by the arbitrator's award of $434,120.40 in rent payable by GG to Lewon for the post-termination period between April 1, 2008 and October 6, 2008 (based on the rental rate of $2.21 per square foot). Based thereon, Lewon contended it was entitled to a net judgment of $405,922.80.

GG, in turn, argued that Lewon's recovery of $434,380.60 in post-termination rents from GG would have to be offset by $538,664.62 in rent that Lewon had collected directly from the subtenants during the post-termination period.

  

Lewon previously had made a similar argument to the arbitrator. [7] However, the arbitrator did not award any monies to any party, as the issuance of a monetary award would have been beyond the scope of the submission to arbitration.

Nonetheless, at the time of the final judgment, the trial court had the authority and the obligation to apply the rental setoffs, an issue which was beyond the scope of the arbitration proceeding.

"At common law, a setoff is based upon the equitable principle that parties to a transaction involving mutual debts and credits can strike a balance between them." ( *Wade v. Schrader* (2008) 168 Cal.App.4th 1039, 1048.) A setoff "is not a claim for relief. It occurs at the end of litigation and 'is a means by which a debtor may satisfy in whole or in part a judgment or claim held against him out of a judgment or claim which he has subsequently acquired against his judgment creditor. The right exists independently of statute and rests upon the inherent power of the court to do justice to the parties before it. [Citations.]' " ( *Keith G. v. Suzanne H.* (1998) 62 Cal.App.4th 853, 860–861.)

Here, in determining the amount of the final judgment, the trial court awarded Lewon rent from GG at $2.21 per square foot for the post-termination period (April 1, 2008 to October 6, 2008), but also credited GG for the rent that Lewon received from the subtenants during that six-month period. That approach was proper.

In sum, the arbitrator did not, and could not, make a monetary award to either party. The arbitrator was charged solely with determining the rental rate for the "Option Period" ($2.21 per square foot) and then determining the rental rate for the six month post-termination period (also $2.21 per square foot).

The issue of setoffs, which was outside the purview of the arbitrator, was addressed by the trial court at the time of final judgment. In giving GG a credit for the rents Lewon received from the subtenants, the trial court did not override or supplant the arbitration award. There was no error.

3. *No merit to Lewon's claim it is entitled to retain GG's entire security deposit of $254,280.*

***9** Lewon retained GG's security deposit for the duration of the litigation. The final judgment, which was a net judgment in favor of GG, included a setoff in favor of GG for the $254,280 security deposit which Lewon retained. On appeal, Lewon asserts an entitlement to retain GG's $254,280 security deposit. The contention is meritless.

By way of background, Civil Code section 1950.7, pertaining to commercial leases, provides in pertinent part at subdivision (c) that the "landlord may claim of the payment or deposit only those amounts as are reasonably necessary to remedy tenant defaults in the payment of rent, to repair damages to the premises caused by the tenant, or to clean the premises upon termination of the tenancy, if the payment or deposit is made for any or all of those specific purposes." Any remaining portion of the security deposit shall be returned to the tenant "in no event later than 30 days from the date the landlord receives possession of the premises." (*Id.* subd. (c)(1).)

Here, there was no issue as to unpaid rent; Lewon admitted GG always paid the rent timely. Further, with respect to the issue of damage to the premises, the jury awarded Lewon $30,060.35 for the roof repair. Therefore, Lewon has no items to deduct from the security deposit and no basis to retain any portion of the $254,280 security deposit. Accordingly, the trial court properly gave GG a setoff for the full amount of its security deposit. [8]

Lewon's essential argument with respect to the security deposit is procedural. Lewon contends that because GG did not seek recovery of its security deposit in its cross-complaint, it was barred from obtaining such relief by way of a setoff at the time of final judgment. The argument is unavailing. The fact and amount of the security deposit were undisputed. Further, the credit for the security deposit arose by operation of law. [9] Therefore, in calculating the final judgment, the trial court properly included a setoff in favor of GG for the $254,280 security deposit which Lewon had retained.

4. *No merit to Lewon's contention the trial court erred in denying its motion for nonsuit on GG's cross-complaint.*

Lewon contends it was entitled to nonsuit on GG's cross-complaint in its entirety. However, the contention is not supported by the record and fails to comply with rudimentary principles of appellate procedure.

***10** Specifically, Lewon argues that because the lease "expressly authorizes or immunizes each of Lewon's misconduct," *none* of GG's alleged causes of action can be sustained, and therefore the trial court committed reversible error in denying Lewon's motion for nonsuit on GG's cross-complaint.

  

The contention is devoid of merit.

As a preliminary matter, Lewon made an oral nonsuit motion *solely* on GG's interference claims, *not* on GG's claims for breach of the lease agreement or breach of the implied covenant of good faith and fair dealing. Lewon cannot raise the issue of whether nonsuit should have been granted on the latter claims, because it did not move for nonsuit on those claims at trial. Our review of the nonsuit ruling is confined to the grounds raised by Lewon in the court below.

We look to the record to determine the exact nature of the motion for nonsuit. The reporter's transcript reflects that in moving for nonsuit on the interference claims, Lewon argued that GG had "failed to provide credible evidence ... that it was damaged." GG's counsel, in turn, argued that GG sustained damage "in terms of the rent payment from the subtenants...." The trial court denied the motion for nonsuit, stating there was evidence of damages and "it will be up to the jury to determine credibility."

The opening brief on appeal does not track the nonsuit motion which was made in the trial court. Instead, in its opening brief, Lewon argues it was entitled to nonsuit on the interference claim because it had an "absolute right to contact the tenants directly and make the communications that form the basis of GG's interference causes of action against it." Because Lewon did not seek nonsuit on said basis in the trial court, it cannot argue on appeal that it was entitled to nonsuit on that ground. [10]

In its *reply* brief on appeal, Lewon finally makes the argument that it should have made in its opening brief, i.e., that GG adduced no credible evidence of damages on its interference claim. As indicated, it was on that basis that Lewon moved for nonsuit below. However, because Lewon chose not to raise this argument until its reply brief, said argument is deemed waived. ( *Reed v. Mutual Service Corp., supra,* 106 Cal.App.4th at p. 1372, fn. 11; see fn. 5, *ante*.)

5. *No merit to claim of prejudicial evidentiary error*.
Lewon contends the trial court "crippled" its cross-examination of Mr. Ly, resulting in an excessive award of $58,262 in favor of GG on the cross-complaint, wherein GG alleged Lewon interfered with GG's sublessees. Our review is governed by Evidence Code section 354. [11]

***11** Specifically, Lewon contends the trial court improperly sustained GG's objections to Lewon's questioning of "Mr. Ly as to whether GG's Lease with Lewon in fact ended on March 31, 2008." Further, Lewon's counsel "was not permitted to ask Mr. Ly whether the $2.21 per square foot base rent that was reflected in an exhibit that Mr. Ly showed to the jury was the base rent determined by the arbitrator."

Lewon is incapable of demonstrating prejudicial evidentiary error in connection with these rulings. As indicated, on GG's cross-complaint, the jury found Lewon intended to disrupt the performance of the sublessees, and it awarded GG damages in the sum of $58,262. This amount was the exact sum Lewon collected from GG's sublessees during the month of March 2008, while GG's master lease was still in effect.

Thus, the $58,262 which the jury awarded to GG for tortious interference did not relate to the post-termination period (April 1, 2008 to October 6, 2008). Further, said damages were not based on the arbitrator's $2.21 figure applicable to the post-termination period, but rather on the rental rate actually in effect under the lease during March 2008. In other words, on GG's claims for tortious interference, the jury did nothing more than award GG the rent monies that Lewon collected directly from GG's sublessees during March 2008, while GG's master lease was still in effect.

## DISPOSITION

The judgment and postjudgment order are affirmed. The GG parties shall recover reasonable attorney fees on appeal pursuant to the attorney fee provision contained in paragraph 31 of the 1993 lease, as well as costs on appeal.

We concur:

KITCHING, J.

ALDRICH, J.

**All Citations**

Not Reported in Cal.Rptr.3d, 2012 WL 5504906

  

Footnotes

1 Lewon gave GG rent concessions pursuant to the two lease amendments amounting to $1,796,556. All but $110,268 stemmed from the second lease amendment.

2 Over the life of the lease, GG paid nearly $10 million in rent to Lewon, and expended another $1 million for leasehold improvements.

3 At trial, Lewon contended that in obtaining its consent to the sublease, GG had misrepresented the transaction with Wu and Tran as a "merger," rather than a "sale." Lewon took the position that GG was in breach of the lease, so as to lose the benefit of the rent concessions and to require GG to repay the full amount of the rent concession. However, none of the documents which Lewon received from GG before Lewon signed the consent referred to the transaction between GG and Wu and Tran as a "merger."

To the contrary, the documentary evidence established that Lewon at all times knew the transaction between GG and Wu and Tran was a *sale,* not a merger. Trial exhibit 21 was a November 26, 2002 fax from John Chang (GG's attorney) to Kenneth Feingold (Lewon's attorney). This document was produced by Lewon during discovery. Exhibit 21 included a faxed copy of the October 18, 2002 assignment agreement; said assignment agreement referred to the *purchase* by Wu and Tran of the *business* and *business assets* of Hong Kong Supermarket. Thus, the documentary evidence established that Lewon knew GG's transaction with Wu and Tran was a purchase and sale agreement, not a merger.

4 On March 5, 2009, Lewon entered into a new lease directly with Wu's company for a rental rate of $1.70 per square foot, substantially below the arbitrator's valuation of $2.21 per square foot.

5 Arguments first raised in the reply brief require no discussion. ( *Reed v. Mutual Service Corp.* (2003) 106 Cal.App.4th 1359, 1372, fn. 11.) The reply brief newly contends, inter alia, that substantial evidence does not support the $58,262 in damages awarded to GG on its interference claim.

6 In view of our determination the rent recapture provisions are barred by Civil Code section 1671, as construed in *Ridgley,* it is unnecessary to address whether the rent recapture provisions are also illegal forfeitures under Civil Code section 3275.

7 Lewon's post-arbitration brief on the issue of retroactive rent stated in pertinent part at paragraph 21: "Since April 1, 2008, Plaintiff Lewon has collected a total of $354,643 in rents from the subtenants occupying the Subject Property, while Defendant Golden Globe has incurred $454,117 in rent obligation since April 1, 2008, calculated by combining six months of rent at $73,321 with $14,191 for six days of rent in October 2008. Therefore, the balance due in rent to Plaintiff [Lewon] by Defendant [GG] is $99,474." Thus, Lewon agreed that the rent it received from the subtenants during the post-termination period was a setoff against GG's rent obligation to Lewon.

8 Although Lewon argues GG failed to affirmatively seek the return of its security deposit, Lewon inconsistently argues that GG did seek the deposit at trial, the jury denied that request, and the trial court erred in overriding the verdict by including the security deposit as part of the judgment. The argument fails. Lewon concedes GG did not submit any evidence regarding the security deposit at trial. Further, neither the jury instructions nor the special verdict forms addressed the security deposit. Therefore, we reject Lewon's backup argument that the jury implicitly resolved the issue of the security deposit claim in Lewon's favor.

9 As stated in *Garfinkle v. Montgomery* (1952) 113 Cal.App.2d 149, 158: "In the present case the lease has been terminated; there were no obligations remaining thereunder. Under such circumstances we know of no legal theory and counsel has suggested none which would allow the lessor to retain the fund. Such retention, if allowed, would be an outright forfeiture."

10 As this court previously stated in *Claxton v. Atlantic Richfield Co.* (2003) 108 Cal.App.4th 327, " 'Only the grounds specified by the moving party in support of its motion should be considered by the appellate court in reviewing a judgment of nonsuit.' " (108 Cal.App.4th at p. 335, italics omitted.)

11 Evidence Code section 354, pertaining to claims of erroneous exclusion of evidence, states in pertinent part: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that: [¶] ... [¶] (c) The evidence was sought by questions asked during cross-examination or recross-examination."