

FILED

2012 MAY 17 AM 11:37

SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

**JOSEPH T. DUENAS, as administrator for
the Estate of Rosario T. Quichocho,
Plaintiff-Appellee,**

v.

**GEORGE AND MATILDA KALLINGAL, P.C., GJADE, INC.,
FORTUNE JOINT VENTURE dba FORTUNE VENTURES,
Defendants-Appellants.**

**DEPARTMENT OF PUBLIC HEALTH AND SOCIAL SERVICES,
GOVERNMENT OF GUAM,
Intervenors-Appellees.**

Supreme Court Case No.: CVA11-001
Superior Court Case No.: CV1440-07

OPINION

Cite as: 2012 Guam 4

Appeal from the Superior Court of Guam
Argued and submitted on September 8, 2011
Hagåtña, Guam

20121234

ORIGINAL

Appearing for Defendants-Appellants:

Ronald P. Moroni, *Esq.*
Moroni Law Offices
San Ramon Bldg.
115 San Ramon St., Suite 301
Hagåtña, GU 96910

Appearing for Plaintiff-Appellee:

Vincent Leon Guerrero, *Esq.*
P.O. Box 12457
Tamuning, GU 96932

BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; and KATHERINE A. MARAMAN, Associate Justice.

MARAMAN, J.:

[1] Defendants-Appellants George and Matilda Kallingal, P.C. (“KPC”) and Fortune Joint Venture (“FJV”) appeal from the trial court’s grant of summary judgment in favor of Plaintiff-Appellee Rosario T. Quichocho, finding FJV, KPC, and GJADE, Inc. (“GJADE”) liable for rent owing to Rosario for use of her property. KPC also appeals the trial court’s dismissal of KPC’s counterclaim seeking execution of a new lease, as well as the final judgment awarding Rosario attorney’s fees and interest on the total unpaid balance of rent, based on provisions in the lease. We affirm in part and reverse in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] In December 1993, GJADE, a Guam corporation consisting of Mr. and Mrs. Gregorio¹ and Josephina Quichocho and their son Anthony Quichocho, entered into a joint venture agreement with KPC, a Guam corporation consisting of Drs. George and Matilda Kallingal. GJADE and KPC formed Fortune Joint Venture for the purpose of “financing and constructing an all concrete commercial building project for lease” on Lot No. 2416-R4 and Lot No. 2416-4. Appellant’s Excerpts of Record (“ER”) at 37 (Joint Venture Agreement, Dec. 15, 1993). The two lots, now known as Legacy Square, were owned by Gregorio Quichocho (“Gregorio”) and his sister Rosario Quichocho (“Rosario”), respectively. Prior to the creation of FJV,² GJADE

¹ Gregorio Quichocho died in 2006, after which time Anthony and Josephina Quichocho were the sole owners of GJADE. Record on Appeal (“RA”), tab 148 at 2 (Finds. Fact & Concl. L., Feb. 25, 2010).

² The agreement was made on December 8, 1993, before the lease between GJADE and Rosario was created.

and KPC agreed in writing that GJADE would provide two parcels of property and KPC would acquire a construction loan from Bank of Guam.

[3] In June 1994, GJADE entered into a written lease with Rosario for Lot No. 2416-4 for a term of seventy-five years. In January 1995, a document entitled “Assignment of Lease Agreement” was signed by Anthony Quichocho, on behalf of GJADE, and George Kallingal, on behalf of FJV. ER at 34 (Assignment of Lease Agreement, Jan. 26, 1995). Legacy Square was erected in 1996. In 1997, KPC loaned itself and GJADE additional funds and gave itself a mortgage on the leasehold interest of both parcels that comprise Legacy Square.³ Rosario stopped receiving rent in 1999. In October 2003, Rosario engaged the services of an attorney to help her recover past due rent. In September 2007, Rosario sent notices of default and demand to cure to GJADE, KPC, and FJV. On November 8, 2007, Rosario notified tenants of Legacy Square that the ground lease had been cancelled. One week later, KPC sent Rosario a letter stating that the cancellation was not effective, and that KPC intended to exercise the right to demand a new lease. On November 21, 2007, KPC sent another letter to Rosario, electing to obtain a new lease in accordance with the terms of the ground lease.

[4] Rosario filed a complaint against GJADE, FJV, and KPC, seeking a declaration of termination of the lease, all past due rent and real property taxes, a declaration of termination of KPC’s leasehold mortgage, and a request for attorney’s fees.⁴ FJV and KPC filed a counterclaim, seeking the execution of a new lease. KPC then filed a motion for partial

³ The actual leasehold mortgage designates FJV, rather than KPC and GJADE, as the mortgagor and KPC as the mortgagee. However, Defendants-Appellants stated in their opening brief that they will not contest the trial court’s finding that the mortgagor is KPC and GJADE.

⁴ Rosario Quichocho passed away after the issuance of the Findings of Fact and Conclusions of Law, but prior to the issuance of the judgment. Joseph T. Duenas, as administrator for the Estate of Rosario T. Quichocho, substituted as plaintiff prior to the issuance of final judgment. See RA, tab 179 at 1 (Judgment, Dec. 23, 2010).

summary judgment, which the trial court granted in part, finding that the statute of limitations barred Rosario from collecting rent owed beyond the four years within which her complaint was filed. KPC filed two subsequent motions for partial summary judgment, claiming that Rosario was unable to prove damages and FJV and KPC were not liable for rent. Rosario filed a cross-motion for summary adjudication, urging the court to find that KPC and FJV were jointly and severally liable for all claims and that base rent payments plus 15% were owed to Rosario for rent post-filing of the complaint. The trial court denied KPC's motions and granted Rosario's cross-motion, finding that: FJV was an assignee of the lease and liable for rent and taxes while in possession of the property; KPC was a partner in the joint venture and jointly and severally liable for debts of FJV; Defendants breached the lease; and all rent collected by Defendants for use of the property was deemed to be held in trust and immediately payable to Rosario. In July 2009, KPC sent a letter to Rosario acknowledging that the ground lease was terminated and demanding a new lease pursuant to section 10(g) of the lease agreement. The trial court subsequently held a four-day bench trial on the issue of damages and issued its Findings of Fact and Conclusions of Law finding, among other things, that GJADE, FJV and KPC were jointly and severally liable to Rosario for rent owed under the ground lease from December 2003 to October 2007, including a 15% monthly penalty interest on the total unpaid balance, and that Rosario was entitled to reasonable attorney's fees and costs. KPC and FJV timely filed this appeal.

II. JURISDICTION

[5] This court has jurisdiction over an appeal from a final judgment of the Superior Court of Guam pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 112-90 (2012)); 7 GCA §§ 3107(b) and 3108(a) (2005).

III. STANDARD OF REVIEW

[6] A trial court's decision to grant a motion for summary judgment is reviewed *de novo*. *Guam Top Builders, Inc. v. Tanota Partners*, 2006 Guam 3 ¶ 8; *Guerrero v. McDonald's Int'l Prop. Co.*, 2006 Guam 2 ¶ 7.

[7] A trial judge's conclusions of law are reviewed *de novo*. *Craftworld Interiors, Inc. v. King Enters.*, 2000 Guam 17 ¶ 6. Therefore, the trial court's conclusions of law that notice was not effective and that KPC's leasehold mortgage terminated will be reviewed *de novo*.

[8] A trial court's award of interest is reviewed for abuse of discretion. *Sumitomo Constr. Co. v. Gov't of Guam*, 2001 Guam 23 ¶ 7.

[9] An award of attorney's fees is generally reviewed for abuse of discretion. *Fleming v. Quigley*, 2003 Guam 4 ¶ 14. However, a determination of the legal basis for an award of attorney's fees is reviewed *de novo* as a question of law. *Id.*

IV. ANALYSIS

A. FJV and KPC's Liability for Unpaid Rent

[10] The trial court determined that FJV and KPC were liable for unpaid rent as a matter of law by virtue of FJV and KPC's possession of property. The trial court also found KPC liable for all debts and obligations of FJV because KPC was a partner in the joint venture. FJV and KPC contend that the "evidentiary material established a genuine issue of material fact that precluded summary judgment." Appellants' Br. at 12 (May 27, 2011).

[11] Summary judgment is proper only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Guam R. Civ. P. 56(c). "In rendering a decision on a motion for summary

judgment, the court must draw inferences and view the evidence in a light most favorable to the non-moving party.” *Guam Top Builders*, 2006 Guam 3 ¶ 8 (quoting *Bank of Guam v. Flores*, 2004 Guam 25 ¶ 7) (internal quotation marks omitted). “A material fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit.” *Id.* ¶ 9 (quoting *Flores*, 2004 Guam 25 ¶ 8) (internal quotation marks omitted). In order to determine whether a genuine issue of material fact exists to preclude summary judgment, we will discuss each of the trial court’s findings in turn.

1. FJV’s Liability Under the Assignment Agreement

a. Validity of the Assignment Agreement

[12] The trial court determined that there was a valid assignment, but did not find this as the basis for FJV and KPC’s rental obligations. *See* Record on Appeal (“RA”), tab 95 at 7-8 (Dec. & Order, June 29, 2009). FJV and KPC argue that Rosario’s deposition and the declarations of Dr. George Kallingal and Anthony Quichocho “show that there never actually was an assignment of the lease.” Appellants’ Reply Br. at 3 (July 7, 2011). FJV and KPC also contend that “neither entity ever assumed responsibility for rent.” Appellants’ Br. at 5. They argue that GJADE and KPC agreed that the document entitled “Assignment of Lease Agreement” was not intended to have any effect, except to help FJV obtain financing from the bank. Reply Br. at 3. Essentially, FJV and KPC argue that there was no assignment, except for the purposes of obtaining financing.

[13] In *Wasson v. Berg*, we held that Guam adheres to the traditional “plain meaning” approach to contract interpretation, looking to the four corners of the contract to determine whether any ambiguity exists as a matter of law. 2007 Guam 16 ¶ 11. We cited that the advantages to this approach were “that it simplifies the interpretation process, provides

predictability, and avoids the risk that a party may conveniently argue that it meant something other than what is written.” *Id.* ¶ 12 (citation omitted). In construing a contract, “[n]either party can obtain an interpretation and result contrary to the express language of a contract by the assertion that it does not truly express his intent.” *Fid. & Cas. Co. of N.Y. v. Nello L. Teer Co.*, 109 S.E.2d 171, 173 (N.C. 1959). “There is a strong presumption that a written instrument correctly expresses the intention of the parties to it.” *J.J. Schaefer Livestock Hauling, Inc. v. Gretna State Bank*, 428 N.W.2d 185, 191 (Neb. 1988). Accordingly, “[w]here the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment.” *Battery Assocs., Inc. v. J & B Battery Supply, Inc.*, 944 F. Supp. 171, 176 (E.D.N.Y. 1996).

[14] The document entitled “Assignment of Lease Agreement” provides:

GJADE, Inc., hereby assigns, transfers and conveys to [Fortune Joint Venture] all its rights and interests under that certain recorded lease dated June 15, 1994 by and between the Assignor and Rosario T. Quichocho . . . duly referenced by that Lease Agreement (attached hereto as Exhibit “A”) recorded at the Department of Land Management . . . for the property described as[] Lot 2416-4

. . . .

This assignment shall remain in full force and effect for all the remainder of the lease term, subject to all conditions, including payment of rents, all covenants, conditions, and terms of the within [sic] Lease.

ER at 34 (Assignment of Lease Agreement) (emphases added). FJV and KPC insist that GJADE and FJV executed the Assignment Agreement under the assumption that it would only be used to obtain financing from the bank. Reply Br. at 3. In his deposition, Dr. Kallingal stated that he considered the agreement to be an understanding that GJADE would take full responsibility for payments to Rosario, consistent with the previous agreements between GJADE and FJV. ER at 167 (Dep. George Kallingal, Aug. 8, 2008). In his affidavit, Anthony Quichocho stated that “it

was never the intention of the parties to make the joint venture or Kallingal, P.C. responsible for rent” because rent was GJADE’s contribution to the joint venture. ER at 120 (Aff. Anthony Quichocho, Jan. 30, 2009). In following the “plain meaning” approach, we find that no ambiguity exists as to the intent of the parties, based on the four corners of the contract. The title of the document denominates the agreement as an “assignment.” ER at 34 (Assignment of Lease Agreement). The language clearly identifies GJADE as assignor and FJV as assignee. The agreement specifies the subject matter to be assigned, namely, the “lease dated June 15, 1994, for the property Lot 2416-4.” *Id.* It is clear that GJADE manifested its intention to transfer the lease to FJV by stating, “GJADE, Inc., hereby assigns, transfers and conveys to Assignee all its rights and interests” under the lease. *Id.* Because the language expressing intent to assign is unambiguous, neither party can claim otherwise.

[15] “An assignment occurs when ‘there is a transfer of some identifiable interest from the assignor to the assignee.’” *Brandon Apparel Grp. v. Kirkland & Ellis*, 887 N.E.2d 748, 756 (Ill. App. Ct. 2008) (quoting *Klehm v. Grecian Chalet, Ltd.*, 518 N.E.2d 187, 190 (Ill. App. Ct. 1987)). “[A]n assignment, to be effective, must include manifestation to another person by the owner of his intention to transfer the right, without further action, to such other person or to a third person.” *McCown v. Spencer*, 87 Cal. Rptr. 213, 219 (Ct. App. 1970) (citation omitted); *see also Amalgamated Transit Union, Local 1756 v. Superior Court*, 209 P.3d 937, 943 (Cal. 2009) (holding manifestation of intent to transfer sufficient). “Generally, no particular form of assignment is required; any document which sufficiently evidences the intent of the assignor to vest ownership of the subject matter of the assignment in the assignee is sufficient to effect an assignment.” *Brandon Apparel Grp.*, 887 N.E.2d at 756 (quoting *Stoller v. Exch. Nat’l Bank of Chi.*, 557 N.E.2d 438, 443 (Ill. App. Ct. 1990)) (internal quotation marks omitted). “The

question is what the parties' objective manifestations of agreement or objective expressions of intent would lead a reasonable person to believe. The parties' undisclosed intent or understanding is irrelevant to contract interpretation." *Steller v. Sears, Roebuck & Co.*, 116 Cal. Rptr. 3d 824, 832 (Ct. App. 2010) (internal citations and quotation marks omitted). A reasonable person would believe that the assignment was valid based on the express language of the agreement, and, thus, any undisclosed understanding between GJADE and FJV is irrelevant. This is especially true in light of the fact that GJADE and FJV relied on the validity of the assignment to obtain financing from Bank of Guam. Because the parties' intent is clearly determined from the face of the agreement, extrinsic evidence is not required and the case is ripe for summary judgment. Accordingly, there is no genuine issue of material fact as to the parties' intent to assign GJADE's interest in the property.

b. Capacity to Assign the Lease

[16] The record shows that Anthony Quichocho signed the Assignment Agreement as authorized representative of GJADE, and George Kallingal signed as authorized representative of FJV. ER at 37 (Assignment of Lease Agreement). FJV and KPC argue that the assignment is invalid because Anthony Quichocho did not have the legal capacity to assign the lease. *See* Appellants' Br. at 7 (citing ER at 120 (Aff. Anthony Quichocho)). According to Anthony Quichocho: "Under the Joint Venture agreement, any contract on behalf of the Joint Venture needed to be executed by both [Gregorio] and Dr. Kallingal. I alone signed the agreement on behalf of GJADE, Inc." ER at 120 (Aff. Anthony Quichocho). Dr. Kallingal also stated that he did not consider the document an assignment when he signed it because it lacked the signatures required by the Joint Venture Agreement. *See* ER at 48 (Dep. George Kallingal).

[17] The Joint Venture Agreement states: “All venture contracts and checks shall require *the joint signatures* of GJADE’s Mr. Gregorio T. Quichocho and [KPC’s] Mr. George Kallingal, or their authorized representatives.” ER at 41-42 (Joint Venture Agreement) (emphasis added). A plain reading of the Joint Venture Agreement reflects that the Assignment Agreement needed both Gregorio’s and Dr. George Kallingal’s signature to be valid. However, 18 GCA § 85325 provides: “A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting.” 18 GCA § 85325 (2005). Thus, when a principal knows all the terms of the contract through its agent, acts upon the assumption that it had executed a contract, and accepts benefits under the contract, such ratification cures any defect in the execution of the contract. *See Fairlane Estates, Inc. v. Carrico Constr. Co.*, 39 Cal. Rptr. 35, 39 (Dist. Ct. App. 1964). In this case, FJV knew the terms of the Assignment Agreement because one of its agents, Dr. George Kallingal, had signed the agreement. *See* ER at 37 (Assignment of Lease Agreement). Moreover, FJV utilized the Assignment Agreement to obtain the benefit of financing from Bank of Guam. *See* ER at 463 (Dep. George Kallingal). FJV’s acceptance of the benefits under the contract therefore operated to ratify any defect in the execution of the contract. Thus, the validity of the assignment is not affected by the absence of Gregorio’s signature on FJV’s behalf.

c. Conditional Assignment Provision in the Lease

[18] The ground lease provides, “Lessee may assign this Lease without the consent of Lessor.” ER at 12 (Ground Lease Agreement). The lease also contains several provisions limiting the ability of GJADE to assign the lease, including that “[a]n assignment cannot be made by Lessee before the completion of the Buildings shown in Schedule A.” *Id.* FJV and

KPC assert that the assignment was invalid because construction of the buildings had not commenced at the time the assignment was executed. Appellants' Br. at 7.

[19] “Where a tenant has attempted assignment of a lease in contravention of its terms, the assignment is not void but merely voidable by the landlord.” *Woods v. N. Pier Terminal Co.*, 475 N.E.2d 568, 570 (Ill. App. Ct. 1985). If the landlord does not elect to treat the leasehold as void upon assignment, the requirements of the lease regarding assignment are deemed waived. *See id.* Thus, “[a] lessor, who, knowing of the assignment of a lease, accepts the assignee as substituted lessee by receiving rent from him without objection, is held to have consented to the assignment.” *Southland of Ala., Inc. v. Julius E. Marx, Inc.*, 341 So. 2d 127, 130 (Ala. 1976). Although Rosario was not initially aware of the Assignment Agreement, the record reflects that she subsequently gained knowledge of the assignment. For example, Rosario sent notices of default and demand to cure to GJADE, KPC, and FJV. ER at 71 (Letter Re: Notice of Default & Demand, Oct. 10, 2007). Rosario’s attorney also indicated that “Mrs. Quichocho takes the position that GJADE Inc., *and its assigns* are responsible for the back rent currently owned.” ER at 80 (Letter Re: Lot No. 2416-4 Maga, Municipality of Sinajana, Nov. 20, 2007) (emphasis added). By receiving rental payments from FJV through her attorney’s office at least as early as 2003, Rosario implicitly consented to the assignment of the lease. *See* ER at 106 (Aff. Michael Gallo, Sept. 11, 2008). Thus, the validity of the assignment is not affected by the lack of completion of the buildings on the property. Because the Assignment Agreement sufficiently evidenced the intent of GJADE to vest the leasehold in FJV, FJV accepted the benefits of the assignment, and Rosario implicitly consented to the assignment, the trial court did not err in granting summary judgment in favor of Rosario, finding that there was a valid assignment.

d. Assumption of Contractual Obligations Under the Ground Lease

[20] Though there is a valid assignment of the lease, there remains the issue of whether the assignment includes the obligation to pay rent. The trial court found that FJV and KPC were liable for rent by virtue of their possession of the property notwithstanding that there was valid assignment. RA, tab 95 at 8 (Dec. & Order, June 29, 2009). The trial court did not find that FJV expressly assumed GJADE's obligations under the lease. *See id.*

[21] “An assignee who takes possession under an assignment without an express assumption of the obligations of the lease is not bound by the contractual obligations of the lease,” but may still be liable for covenants running with the land, discussed *infra* Part A.2.a. *Kelly v. Tri-Cities Broad., Inc.*, 195 Cal. Rptr. 303, 310 (Ct. App. 1983). We look to the plain meaning of the language in the contract to determine whether the contract provision is ambiguous as to what obligations were transferred to the assignee. The Assignment Agreement states, “GJADE, Inc., hereby assigns, transfers and conveys to Assignee all its rights and interests under that certain recorded lease” ER at 34 (Assignment of Lease Agreement). The agreement further states: “This assignment shall remain in full force and effect for all the remainder of the lease term, *subject to all conditions*, including payment of rents, all covenants, conditions, and terms of the within [sic] Lease.” *Id.* (emphasis added).

[22] Although we have determined the document itself is unambiguous as to the assignment, we find that the document is ambiguous as to the obligations transferred. There is no indication of what rights and interests FJV assumed under the lease. Moreover, though the lease states that the assignee takes the property subject to all covenants, conditions, and terms of the lease, the lease does not give meaning to the phrase “subject to all conditions.” Because we will not make inference as to what the phrase “rights and interests” or “subject to all conditions” entails, we

cannot find that FJV expressly assumed GJADE's obligations under the lease. Thus, FJV is liable only for the obligations, or covenants, that run with the land.

2. Obligation to Pay Rent Based on Privity of Estate

a. FJV's Current Possession of the Property

[23] The trial court found FJV liable for rent based on its possession of the property. RA, tab 95 at 8 (Dec. & Order, June 29, 2009). FJV and KPC object to the trial court's finding that occupancy of the premises makes FJV liable for rent, based on the contention that GJADE agreed to be solely responsible for rent. *See* Appellants' Br. at 5.

[24] A lease has a dual character as a conveyance of an estate for years and a contract between lessor and lessee. *Ellingson v. Walsh, O'Connor & Barneson*, 104 P.2d 507, 509 (Cal. 1940) (en banc). As a result, dual obligations arise—contractual obligations under the lease and obligations under the law that arise from the creation of the tenancy, i.e., obligations based on either privity of contract or privity of estate. *See id.* In finding FJV liable for rent, the trial court relied on *Ellingson*, where the California Supreme Court held that there is a common law obligation to pay rent based on current tenancy, even in the absence of a lease. RA, tab 95 at 7 (Dec. & Order, June 29, 2009); *Ellingson*, 104 P.2d at 509. The *Ellingson* court reasoned:

Tenancies in property need not necessarily be created by valid leases. One may become a tenant at will or a periodic tenant under an invalid lease, or without any lease at all, by occupancy with consent. *Such tenancies carry with them the incidental obligation of rent, and the liability therefore arises not from contract but from the relationship of landlord and tenant. The tenant is liable by operation of law.* Where there is a lease[,] the liability of the tenant arising by operation of law is not superseded by the contractual obligation. Both liabilities exist simultaneously.

Ellingson, 104 P.2d at 509 (emphasis added). Thus, “despite the lack of contractual assumption of the obligations of the lease, the successor to the original lessee is bound by the covenant to

pay rent in the lease, which runs with the land.” *Id.* “California law is clear: An assignee, in the absence of an express assumption, is liable only for covenants which run with the land and only during the period of his occupancy.” *Kelly*, 195 Cal. Rptr. at 310.

[25] Guam law similarly provides that covenants that run with the land bind the assigns in the same manner as if they had personally entered into them. *See* 18 GCA § 81104 (2005). The covenants that run with the land are those specified in Chapter 18 of the Guam Code and those incidental thereto, including covenants for the payment of rent or taxes. *See id.*; 18 GCA § 81107 (2005). Thus, because FJV occupies the property, the partnership is obligated to pay rent during its occupancy as a covenant that runs with the land, even if FJV did not expressly assume the obligation to pay rent. We now address whether, under Guam’s partnership laws, FJV, KPC, and GJADE are jointly and severally liable for the rent owed to Rosario.

b. Joint and Several Liability of FJV, KPC, and GJADE

[26] “A partnership is an association of two or more persons to carry on as co-owners a business for profit” 18 GCA § 25201 (2005) (emphasis omitted). The trial court found FJV to be a valid partnership, citing to the provision in the Joint Venture Agreement that net rental income was to be divided equally between the parties and noting that FJV filed a “U.S. Partnership Return of Income.” RA, tab 95 at 9 (Dec. & Order, June 29, 2009). We do not see any reason to disturb the trial court’s finding that FJV is a valid partnership.

[27] The trial court further found that GJADE and KPC were jointly and severally liable for all debts and obligations of the partnership under 18 GCA § 25307(a) and (b). *Id.* However, 18 GCA § 25307(b) provides that all partners are liable “[j]ointly for all other debts and obligations of the partnership.” 18 GCA § 25307(b) (2005) (emphasis added). Thus, FJV, KPC, and GJADE would be only jointly liable, not *jointly and severally* liable under 18 GCA § 25307(b)

for debts of the partnership. Notwithstanding, 18 GCA § 25307(a) provides that all partners are liable “[j]ointly and severally for everything chargeable to the partnership under § 25305 [for a partner’s wrongful act] and § 25306 [for a partner’s breach of trust].” 18 GCA § 25307(a).

Liability for a partner’s wrongful act is explained:

Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

18 GCA § 25305 (2005). Anthony Quichocho, as GJADE’s agent, stopped paying rent to Rosario in 1999. RA, tab 148 at 7 (Finds. Fact & Concl. L.). It is clear that GJADE’s withholding rent is a wrongful act that occurred in the ordinary course of business of FJV; Anthony Quichocho was supposed to use FJV’s funds to pay rent in the ordinary course of FJV’s operations, but he did not. Moreover, the withholding of rent caused Rosario a loss of income from the property. Because the partnership and all partners are jointly and severally liable for a partner’s wrongful act, FJV, KPC, and GJADE are jointly and severally liable for the loss to Rosario resulting from GJADE’s withholding of rent. Therefore, the trial court did not err in granting summary judgment in favor of Rosario and holding FJV, KPC, and GJADE jointly and severally liable for unpaid rent as a matter of law.

B. KPC’s Counterclaim for a New Lease

[28] The trial court determined that Rosario cancelled the ground lease on November 8, 2007. *Id.* at 8. Section 10(g) of the lease agreement provides that any mortgage holder has the right to elect to demand a new lease within thirty days after the termination of the ground lease. ER at 17 (Ground Lease Agreement). KPC counterclaimed for a new lease pursuant to section 10(g), based on its status as a leasehold mortgagee of the property. The trial court dismissed the

counterclaim because KPC's demand for a new lease did not comply with the notice requirements set out in the lease agreement, or, alternatively, because KPC's mortgage was extinguished upon termination of the lease and, therefore, KPC was not entitled to make such a demand. *Id.* at 23-24. KPC argues that notice was sufficient because Rosario received actual notice of the demand, notwithstanding that the demand letter was not sent by registered mail. Appellants' Br. at 13-14. KPC also argues that its right to demand a new lease did not end upon termination of the ground lease because a demand could not be made "unless and until the ground lease was terminated." *Id.* at 15. In response, Rosario argues that KPC's November 15 and November 21 letters were mere letters of intent to demand, while actual demand was not received until July 9, 2009, twenty months after the deadline set out in the lease agreement. *See* Appellee's Br. at 17-19. We discuss these arguments in turn.

1. Actual Receipt of Demand Sufficient

[29] KPC argues that the notice given was sufficient because Rosario received actual notice via facsimile, notwithstanding that the lease required notice to be sent by registered mail. Appellants' Br. at 13-14. Section 10(g) of the ground lease provides:

If the Lease shall terminate for any reason, Lessor agrees that the holder of any mortgage or secured interest upon the Premises, or any portion thereof, shall have the right, for a period of thirty (30) days subsequent to such termination, to elect to demand a new lease of the Premises If any such leasehold mortgagee or secured party shall elect to demand for a new lease within the period, it shall give written notice to Lessor of such election

ER at 17 (Ground Lease Agreement). Section 37 further states, in relevant part:

All notices to be given with respect to this Lease shall be in writing. *Each notice shall be sent by registered mail*, postage prepaid and return receipt requested, to the party to be notified at the address set forth above or at such other address as either party may from time to time designate in writing.

Id. at 31 (emphasis added). Thus, under the terms of the ground lease, notice was to be sent by registered mail within thirty days of the termination of the lease. One week after the notice of cancellation, KPC sent Rosario a letter via facsimile stating that the cancellation was not effective because notice was not sent to KPC, but that KPC intended to exercise the right to demand a new lease “if and when the original ground lease is effectively terminated.” ER at 78-79 (Nov. 15, 2007 Letter). On November 21, 2007, KPC sent another letter via facsimile, stating “if the lease has been properly terminated, then Kallingal, P.C. elects to have a new lease in accordance with provisions in section 10g of the ground lease.” ER at 82 (Nov. 21, 2007 Letter). On July 9, 2009, KPC sent a letter via facsimile, acknowledging that the ground lease was terminated and demanding a new lease. RA, tab 148 at 9 (Finds. Fact & Concl. L.).

[30] After determining the November 21, 2007 letter to be a demand letter, the trial court concluded that section 37 “applies to notices that are provided for by the lease.” *Id.* at 24. Thereafter, the court concluded that KPC’s demand failed to conform with the provision in the lease agreement that required all notices to be in writing and sent to the party via registered or certified mail. *Id.* However, the trial court did not address the fact that Rosario received actual notice.

[31] The Missouri Court of Appeals has commented on the sufficiency of actual notice:

Generally if a lease specifies the kind of notice and the manner in which it is to be given for lessee to exercise an option to extend the term there must be compliance with it in order to bind the lessor. However, even though such notice might not have complied with the provisions in the lease, *if it was actually received within the specified time it is sufficient.*

M.D. & Assocs., Inc. v. Sears, Roebuck & Co., 749 S.W.2d 454, 456 (Mo. Ct. App. 1988) (emphasis added) (internal citations omitted). Thus, notice is sufficient if it is actually received, despite failure to comply with the lease’s specifications on the type and manner of notice. *Id.*

[32] The Court of Appeals of Arizona has further explained that any method of notice is sufficient if it serves the same function and purpose as the authorized method:

[A]ny method of transmission of notice of renewal of a lease may be employed which is effective to bring such notice home to the lessor and serves the same function and purpose as the authorized method. This is true although the lease requires notice to be made in a particular way.

Univ. Realty & Dev. Co. v. Omid-Gaf, Inc., 508 P.2d 747, 749 (Ariz. Ct. App. 1973) (citations omitted) (lease required registered mail, notice hand-delivered). Courts have discussed the purpose of registered mail in particular, noting that “[t]he obvious purpose of providing for notice by registered mail was to insure the delivery of the notice, and to settle any dispute that might arise between the parties as to whether or not the notice was duly received.” *E. Eighty-Second St. Corp. v. Rogers*, 183 N.Y.S. 297, 300 (App. Div. 1920) (finding actual notice effective even though lease required registered mail); *see also Fletcher v. Frisbee*, 404 A.2d 1106, 1109 (N.H. 1979) (acknowledging purpose of registered mail to substantiate receipt and finding notice by ordinary mail valid). Having adopted this view, the Oklahoma Supreme Court has found that a lessee could give notice via facsimile where the fax transmission served the same function and purpose as notice delivered personally or by mail and was delivered timely. *See Osprey L.L.C. v. Kelly-Moore Paint Co.*, 984 P.2d 194, 198 (Okla. 1999). Incompliant methods of notice are ineffective in cases where actual notice is absent or disputed. *See, e.g., Janus Theatres of Burlington, Inc. v. Aragon*, 410 S.E.2d 218, 220 (N.C. Ct. App. 1991); *W. Tire, Inc. v. Skrede*, 307 N.W.2d 558, 563 (N.D. 1981).

[33] In this case, notice was required to be sent by registered mail, but was instead sent by facsimile. Rosario does not deny receiving the demand letter, which was stamped received by her attorney’s office on November 23, 2007, well within the 30-day period allowed for receipt.

ER at 82 (Nov. 21, 2007 Letter); RA, tab 148 at 23 (Finds. Fact. & Concl. L.). Though the lease required notice by registered mail, actual receipt of notice was sufficient to insure the delivery of notice and settle any dispute as to receipt of notice. Moreover, the fax transmission at hand served the same function and purpose as notice delivered by registered mail because the facsimile put Rosario on notice of KPC's demand for a new lease and confirmed receipt, just as registered mail would have. Indeed, this is not a case where actual receipt is disputed. We hold that actual notice is sufficient, given that the employed method of transmission serves the same function and purpose as the authorized means. Thus, the trial court erred in denying KPC's counterclaim on the grounds that Rosario did not comply with notice requirements.

2. Characterization of Demand Letter Raised for the First Time on Appeal

[34] The trial court concluded that KPC submitted a demand letter on November 21, 2007, in accordance with the terms of the ground lease. RA, tab 148 at 23 (Finds. Fact. & Concl. L.). Rosario contends for the first time on appeal that there are reasons why a new lease should not be executed, including that the trial court erred in characterizing the November 21, 2007 letter as a demand, which she contends was not made until July 9, 2009. Appellee's Br. at 17-19.

[35] As a matter of general practice, "this court will not address an argument raised for the first time on appeal." *Univ. of Guam v. Guam Civil Serv. Comm'n*, 2002 Guam 4 ¶ 20 (citing *Dumaliang v. Silan*, 2000 Guam 24 ¶ 12). In *Dumaliang v. Silan*, we clarified that the rule precluding appellate review of newly raised issues is discretionary, and an appellate court may recognize such exceptions as: "(1) when review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is purely one of law." 2000 Guam 24 ¶ 12 n.1. Here, Rosario's characterization of the November 21 letter as a letter of intention rather

than demand is a question of law. However, at trial, Rosario's attorney referred to the letter as a demand: "In July 2009, [KPC] made *another* demand for a new lease." Tr. at 140 (Bench Trial, Oct. 22, 2009) (emphasis added). Because Rosario conceded at trial that the letter was a demand, we decline to entertain the issue for the first time on appeal. In the instant case, review of this issue is not necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process. Thus, we decline to exercise our discretion to consider whether the November 21 letter was a demand or simply a letter of intention.

3. KPC Had the Right to Demand a New Lease

[36] The trial court relied on alternate grounds for denying KPC's counterclaim, concluding that KPC's leasehold mortgage was extinguished when the ground lease was terminated and, therefore, KPC was not entitled to demand a new lease. RA, tab 148 at 24-25 (Finds. Fact & Concl. L.). KPC argues that the termination of the lease gave rise to KPC's right to demand a new lease. Appellants' Br. at 16.

[37] Ordinarily, the termination of a lease extinguishes a security interest because there is no remaining leasehold interest to which its security interest could attach. *In re Gillis*, 92 B.R. 461, 465 (Bankr. D. Haw. 1988). In this case, however, the lessor provided otherwise in the lease.

Section 10(g) of the ground lease states:

If the Lease shall terminate for any reason, Lessor agrees that the holder of any mortgage or secured interest upon the Premises, or any portion thereof, shall have the right, for a period of thirty (30) days *subsequent to such termination*, to elect to demand a new lease of the Premises or the relevant portion thereof.

ER at 17 (Ground Lease Agreement) (emphasis added). Interpretation of a provision in a ground lease is a matter of contract construction that presents a question of law. *See Coleman v. Regions Bank*, 216 S.W.3d 569, 574 (Ark. 2005); *Mobil Oil Guam Inc. v. Tendido*, 2004 Guam 7 ¶ 16

(“[T]he interpretation of a contract is a question of law which we review de novo.”). Provisions of a ground lease that are clear and complete are enforceable as written rather than subject to construction, even though the court views the terms as unreasonable or harsh. *Wallace v. 600 Partners Co.*, 658 N.E.2d 715, 717 (N.Y. 1995) (“[C]lear, complete writings should generally be enforced according to their terms.” (quoting *W.W.W. Assocs., Inc. v. Giancontieri*, 566 N.E.2d 639, 640 (N.Y. 1990))); *Memphis Hous. Auth. v. Thompson*, 38 S.W.3d 504, 511 (Tenn. 2001) (“[T]he clear language must be interpreted and enforced as written even though it contains terms which may be considered harsh and unjust by a court.”). It follows that the parties’ intent as expressed in a lease is the controlling factor in interpreting a lease. See *Robinson v. Weitz*, 370 A.2d 1066, 1069 (Conn. 1976); *Guam United Warehouse Corp. v. DeWitt Transp. Servs. of Guam, Inc.*, 2003 Guam 20 ¶ 24 (recognizing the parties’ intent determined from the plain meaning of the contractual language as controlling).

[38] Section 10(g) of the ground lease unambiguously provides that the mortgagee has a right to demand a new lease even after the lease is terminated. See ER at 17 (Ground Lease Agreement). Based on the plain language of the contract, the parties intended for the mortgagee’s right to demand a new lease to survive the termination of the lease. Therefore, the trial court’s determination that KPC is not entitled to demand a new lease is contrary to the intentions of the contracting parties. The trial court’s interpretation would bring about a result contrary to the purpose of the lease provision, wherein no mortgagee holding a security interest on the premises would ever have the right to demand a new lease after termination of the ground lease. Notwithstanding the general rule that a leasehold mortgage extinguishes upon termination of a lease, parties are free to contract otherwise. See *In re Gillis*, 92 B.R. at 465. Thus, KPC’s right as a mortgagee to demand a new lease survived the termination of the lease, and the trial

court erred in dismissing KPC's counterclaim demanding execution of a new lease. We remand the matter back to the trial court to permit KPC to execute a new lease.

[39] Having held that KPC is entitled to a new lease, we consider next the terms of the new lease based on a plain reading of the ground lease. The ground lease provides:

Such new lease shall be for a term commencing on the date of the termination of this Lease, and expiring on the same date state in this Lease as the fixed date for the expiration thereof. *The rent and all provisions, covenants and conditions of such new lease shall be the same as the rent, provisions, covenants, and conditions of the Lease*

ER at 17 (Ground Lease Agreement) (emphasis added). Based on this clause, it is clear that the rent under the new lease shall continue under the terms set out in the original lease. Although KPC contends that the lease should be renewed and rent reset to Year One of the original lease, *see* Appellants' Br. at 11, it is clear that the new lease is to commence where the original lease terminated. Thus, when the underlying lease terminated in 2007, in Year Thirteen, the new lease commenced in accordance with the rental formula of Year Thirteen in the original lease. Because we have concluded that FJV and KPC are to pay rent under the terms of the original lease, the issue of how to measure damages for possession of the property post-termination of the lease is moot. We remand the matter back to the trial court to calculate the damages in accordance with this opinion.

C. The Award of the 15% Penalty Interest Charge

[40] The trial court awarded damages to Rosario for rent owed under the ground lease from December 2003 to October 2007, including a 15% monthly penalty interest on the total unpaid balance of rent. RA, tab 148 at 14-19 (Finds. Fact & Concl. L.). The trial court awarded interest pursuant to the following provision:

Delinquent payments. If any payment due hereunder is not paid within ten (10) days after the due date, Lessor shall have the right, without waiving any breach of default by Lessee, to demand and receive the unpaid sum plus fifteen percent (15%) as penalty per month on the balance due (including penalty charges).

ER at 24 (Ground Lease Agreement). KPC asserts that the delinquent payment provision of the lease is unenforceable as a penalty because it imposes interest of 180% per year and does not reflect a reasonable interest rate. Appellants' Br. at 16. Alternatively, KPC argues that the provision should not have been applied to FJV or KPC because they were not parties to the lease. *Id.* at 18.

1. Delinquent Payment Provision as a Covenant Running with the Land

[41] The trial court found that FJV is obligated to pay rent and taxes required under the ground lease because FJV is in possession of the property. RA, tab 148 at 10 (Finds. Fact & Concl. L.). After concluding that KPC, FJV, and GJADE breached the ground lease by failing to pay rent to Rosario, the trial court found each entity liable for the 15% penalty interest set out in the lease. *Id.* at 14-19. FJV and KPC argue that the delinquent payment provision is unenforceable because FJV and KPC were not parties to the ground lease. Appellants' Br. at 18. In arguing for enforcement, Rosario simply asserts that KPC accepted the assignment on behalf of FJV. Appellee's Br. at 21.

[42] Having determined that FJV was not a party to the ground lease and did not assume GJADE's contractual obligations under the lease, we find that FJV is liable only for the covenants contained in the lease that run with the land. *See, e.g., Kelly*, 195 Cal. Rptr. at 310 ("An assignee . . . is liable only for covenants which run with the land . . ."). Title 18 GCA § 81106 provides: "Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property, or some part of it then in existence, runs with the

land.” 18 GCA § 81106 (2005). Under California’s parallel statute,⁵ a covenant for the direct benefit of the property is defined as any covenant that affects the title to real property or any interest or estate therein of the covenantee. *Sac. Suburban Fruit Lands Co. v. Whaley*, 194 P. 1054, 1056 (Cal. Dist. Ct. App. 1920) (holding that covenant to release from lien runs with the land). A covenant is also made for the direct benefit of the property when the covenant “touches or concerns” the covenantee’s land, so as to increase its value in the hands of the holder. *See id.* at 1057; *Anthony v. Brea Glenbrook Club*, 130 Cal. Rptr. 32, 34 (Ct. App. 1976) (holding that mandatory membership obligation runs with the land). Under Guam law, a covenant to pay rent runs with the land. 18 GCA § 81106. In *Kelly*, a covenant to arbitrate was found to run with the land because it related to rental payments under the lease and to property interests of the lessor and lessee. *Kelly*, 195 Cal. Rptr. at 310.

[43] We cannot say that a covenant to pay interest on an unpaid sum of money has any effect on the lessee’s possession of the property or the lessor’s ownership of the property. This is especially illustrated by the covenant in the instant case, which provides that the right of the lessor to demand the delinquent payment is not a waiver of the tenant’s breach. *See* ER at 24 (Ground Lease Agreement). Unlike a covenant to arbitrate, a covenant to pay interest on an unpaid sum of money, including penalty charges, does not relate to the recovery of rental payments. Moreover, such a covenant does not increase or enhance the value of the land. We hold that a covenant to pay interest on an unpaid sum of money does not run with the land. Because FJV did not assume GJADE’s contractual obligations under the lease and the covenant does not run with the land, FJV and KPC are not obligated to pay the 15% penalty interest on the unpaid balance of rent. Because the 15% penalty interest provision is unenforceable against FJV

⁵ Cal. Civil Code § 1462 (West 2012).

and KPC, the trial court abused its discretion in awarding 15% interest on the total unpaid balance due. We do not have to determine whether the delinquent payment provision is unenforceable as a penalty provision because the issue is now moot.

2. Interest Rate Calculated at Simple Interest of Six Percent

[44] Rosario is not entitled to recover the penalty interest set out in the lease agreement, but she is entitled to recover simple interest under Guam law. *See* 20 GCA § 2110 (2005). Title 20 GCA § 2110 provides: “Every person who is entitled to recover damages certain, or capable of being made certain by calculation, . . . is entitled also to recover interest thereon from that day” *Id.* Under California law, where amount of plaintiff’s claim can be determined by established market values or by computation, award of prejudgment interest is mandated. *See U.S. Fid. & Guar. Co. v. Lee Invs. LLC*, 641 F.3d 1126, 1140 (9th Cir. 2011). In this case, damages for unpaid rent can be ascertained from the rental rate agreed upon in the lease, as discussed in Part B.3 above. *See* ER at 4-5 (Ground Lease Agreement). Rosario is entitled to recover damages certain or capable of being made certain by calculation; therefore, she is entitled to recover prejudgment interest at the legal rate of interest in Guam.

[45] The legal rate of interest for the detention of money under Guam law is six percent, which may be awarded in the judgment from the time the particular obligation to pay arose. *See* 18 GCA § 47106 (2005); *Sears, Roebuck & Co. v. Blade*, 294 P.2d 140, 149 (Cal. Dist. Ct. App 1956) (holding that interest under parallel California statute is the legal rate of interest for the detention of money).⁶ In *Guam United Warehouse*, we found that 18 GCA § 47106 does not

⁶ Title 18 GCA § 47106 provides:

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,

specifically prescribe compound interest and held that simple interest is to be awarded “in the absence of some special circumstance dictating otherwise.” *Guam United Warehouse*, 2003 Guam 20 ¶ 38 (citation and internal quotation marks omitted). Here, there are no special circumstances present that warrant compound interest. Therefore, the legal interest rate of six percent per annum shall be assessed on the amount of unpaid rent owed to Rosario.

D. Award of Attorney’s Fees

[46] In her complaint, Rosario prayed for attorney’s fees. RA, tab 3 (Compl., Nov. 27, 2007). In its Findings of Fact, the trial court awarded Rosario reasonable attorney’s fees and costs for the prosecution of the lawsuit, and in collection of the judgment, based on the fact that Rosario prevailed on her breach of contract claim and the lease authorized attorney’s fees for the prevailing party. RA, tab 148 at 22 (Finds. Fact & Concl. L.). Rosario thereafter filed a motion for attorney’s fees in the amount of one-third of the total monetary award or, in the alternative, based on her attorney’s hourly rate. RA, tab 159 at 3 (Dec. & Order, July 6, 2010). The trial court granted Rosario’s motion, awarding attorney’s fees based on the fee agreement between Rosario and her attorney. *Id.* The court thereafter issued a final judgment awarding “reasonable attorney’s fees and costs for the collection of rent and the prosecution of [the] lawsuit . . . and collection and enforcement of this Judgment.” RA, tab 179 at 2 (Judgment, Dec. 23, 2010).

1. Attorney’s Fees Based on Contract

[47] FJV and KPC primarily argue that they “were not parties to the lease agreement and were not bound by any of its terms, except those which could run with the land.” Appellants’ Br. at 20. In the alternative, FJV and KPC assert that attorney’s fees should have been proven at trial

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.

under Rule 54(d)(2) of the Guam Rules of Civil Procedure (“GRCP”) because contractual damages must be proven at trial.⁷ *Id.* Rosario counters that the issue of attorney’s fees is not ripe for judgment because the trial court’s order granting attorney’s fees was not included in the final judgment. Appellee’s Br. at 22. Rosario is mistaken, as the final judgment contained a provision for attorney’s fees. RA, tab 179 at 2 (Judgment). Thus, this court has jurisdiction over the issue of attorney’s fees.

[48] We have recognized that “under the American Rule, attorney’s fees are generally not recoverable unless authorized by statute, contract, or under equitable circumstances.” *Fleming*, 2003 Guam 4 ¶ 20. In awarding attorney’s fees, the trial court relied on section 29 of the ground lease, which provides: “Should either party commence any legal action or proceeding against the other based upon this Lease, or any provision hereof . . . the prevailing party shall be entitled to an award of attorney’s fees, collection costs, and court costs.” RA, tab 148 at 22 (Finds. Fact & Concl. L.). The trial court concluded that Rosario is entitled to attorney’s fees because Rosario prevailed in her breach of contract claim against GJADE, FJV, and KPC. *Id.* It is clear that the trial court awarded attorney’s fees based on contract, particularly based on the provision mandating the award of attorney’s fees to the prevailing party for any action based upon the lease. However, as previously discussed, FJV and KPC did not assume the contractual obligations under the lease and, therefore, cannot be liable for attorney’s fees pursuant to the lease agreement. Because attorney’s fees cannot be awarded as contractual damages, FJV and KPC’s argument that contractual damages need to be proven at trial is moot. Nevertheless,

⁷ FJV and KPC asserted GRCP 54(b)(2) as the basis for their argument, but went on to cite the text of GRCP 54(d)(2).

attorney's fees may be awarded if authorized by other equitable circumstances, and we must consider whether the covenant to pay attorney's fees runs with the land.

2. Attorney's Fees as a Covenant Running with the Land

[49] FJV and KPC argue that they are liable only for covenants that run with the land, implying that a covenant to pay attorney's fees does not run with the land. *See* Appellants' Br. at 20. The Utah Supreme Court has held that a covenant providing that either party agrees to pay costs and attorney's fees incurred by the other while enforcing covenants of the lease is not a covenant running with the land, but rather a personal covenant between the parties to the lease. *Latses v. Nick Floor, Inc.*, 104 P.2d 619, 624 (Utah 1940). The Illinois Court of Appeals also explained that a covenant to pay a solicitor's fees "in no way concerns the land, the improvements on the land, the title to the land, nor the quality or character of either." *Keogh v. Peck*, 259 Ill. App. 503, 518 (App. Ct. 1931). We cannot say that a covenant to pay attorney's fees is made for the direct benefit of the property, as it does not affect the lessee's possession of the property or the lessor's ownership of the property. GJADE's covenant to pay attorney's fees to the prevailing party for an action based on the lease is not a covenant running with the land, but rather a personal covenant between GJADE and Rosario. Given that FJV did not assume the contractual obligations of the lease and the covenant to pay attorney's fees did not run with the land, we hold that the trial court erred in awarding attorney's fees to Rosario.

V. CONCLUSION

[50] We **AFFIRM** the trial court's summary judgment in favor of Rosario, determining that FJV and KPC were jointly and severally liable for unpaid rent as a matter of law. Although there was a valid assignment, FJV did not assume GJADE's contractual obligations under the lease

and is liable only for unpaid rent because it is in possession of the property. FJV, KPC, and GJADE are jointly and severally liable for the unpaid rent by virtue of their partnership.

[51] We **REVERSE** the trial court’s dismissal of KPC’s counterclaim for a new lease because Rosario had actual notice of KPC’s demand for a new lease. KPC is entitled to a new lease, and the rental obligations under the new lease shall reflect the same terms that existed under the original lease. As such, the issue of how to measure the damages for possession of the property post-termination of the lease is moot.

[52] We **REVERSE** the trial court’s assessment of 15% interest on the total unpaid balance owing by FJV and KPC because a covenant to pay interest is not a covenant running with the land. The delinquent payment provision is unenforceable against FJV and KPC because they were not parties to the ground lease and did not assume GJADE’s contractual obligations under the lease. Interest on rent owing shall be calculated at a simple interest rate of six percent.

[53] We **REVERSE** the trial court’s award of attorney’s fees because a covenant to pay attorney’s fees does not run with the land.

[54] The case is **REMANDED** to the trial court for further proceedings consistent with this opinion.

Original Signed: **Robert J. Torres**
By

ROBERT J. TORRES
Associate Justice

Original Signed: **Katherine A. Maraman**
By

KATHERINE A. MARAMAN
Associate Justice

Original Signed: **F. Philip Carbullido**
By

F. PHILIP CARBULLIDO
Chief Justice