

AUG 09 2007

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	WW-07-1043-DJMo
)		
ONECAST MEDIA, INC.,)	Bk. No.	00-11351
)		
Debtor.)	Adv. No.	01-01429
)		
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NANCY JAMES, Chapter 7)		
Trustee; COMERICA BANK -)		
CALIFORNIA,)		
)		
Appellants,)		
)		
v.)	MEMORANDUM¹	
)		
FIRST AVENUE WEST BUILDING,)		
LLC, and FIRST WEST BUILDING)		
00, LLC,)		
)		
Appellees.)		
)		
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Argued and Submitted on July 27, 2007
at Seattle, Washington

Filed - August 9, 2007

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Hon. Samuel J. Steiner, Bankruptcy Judge, Presiding.

Before: DUNN, JAROSLOVSKY² and MONTALI Bankruptcy Judges.

¹This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

²Hon. Alan Jaroslovsky, U.S. Bankruptcy Judge for the Northern District of California, sitting by designation.

1 This appeal requires that we determine whether the
2 bankruptcy estate, where the debtor was a lessee under a
3 commercial lease, is entitled to a return of the debtor's
4 security deposit from the lessor, despite the debtor's
5 prepetition breach and postpetition rejection of the lease
6 pursuant to 11 U.S.C. § 365. On cross-motions, the bankruptcy
7 court granted summary judgment in favor of the lessor and against
8 the trustee. We AFFIRM.

9
10 **I. FACTS**

11 Onecast Media, Inc., dba Seasonticket.com ("Debtor"),
12 negotiated with First Avenue West Building, LLC ("Lessor") to
13 lease 31,522 square feet of commercial office space ("Leased
14 Premises") in downtown Seattle. The lease ("Lease") was executed
15 June 27, 2000, and was to commence September 1, 2000, for the
16 portion of the Leased Premises located on Floor 5³, and
17 November 1, 2000, for the portion of the Leased Premises located
18 on Floors 1 and 2. The Lease had a five year, two month term,
19 ending October 31, 2005. The annual base rent started at \$26.60
20 per square foot and increased through the term of the Lease until
21 it reached \$32.00 per square foot in Year 5. The aggregate rent
22 due under the Lease was \$4,684,284. Lessor was to provide an
23 allowance for tenant improvements in the amount of \$189,132.

24 The Lease required that Debtor provide a refundable security
25 deposit ("Security Deposit") in the amount of \$419,299.98. The
26 Security Deposit Debtor provided took the form of \$69,883.33 cash

27
28 ³With respect to the Floor 5 Leased Premises, the Lease did
not commence as to the final 1,572 square feet until May 1, 2001.

1 and a letter of credit ("Letter of Credit") in the amount of
2 \$349,416.65.⁴

3 Debtor defaulted under the Lease almost immediately by
4 failing to pay the rent due under the Lease on November 1, 2000.
5 Lessor issued a prompt notice of default on November 6, 2000. In
6 response, by its letter dated November 8, 2000, Debtor
7 acknowledged the default, announced that it would not take
8 occupancy of Floors 1 and 2 of the Leased Premises, and advised
9 Lessor of its intent to vacate Floor 5 of the Leased Premises
10 within 14 calendar days. Debtor specifically stated its intent
11 to assist in re-leasing the Leased Premises with the motivation
12 of recapturing a portion or all of the Security Deposit. On
13 November 15, 2000, Lessor drew the full amount of the Letter of
14 Credit, and shortly thereafter applied \$81,121.25 of the Security
15 Deposit to unpaid Lease obligations for November 2000, including
16 rent, parking and a late fee. Lessor transferred the balance of
17 the Security Deposit (\$318,178.73) to its successor.⁵

19
20 ⁴The letter of credit was issued by Imperial Bank, the
21 predecessor in interest to Comerica Bank - California
22 ("Comerica"). Comerica was fully secured in a certificate of
23 deposit which collateralized the Debtor's obligations under the
24 letter of credit and accordingly has no direct claim to the
25 Security Deposit. However, Comerica was a co-plaintiff in the
26 underlying adversary proceeding and asserted, together with the
Trustee, an interest in the Security Deposit, by virtue of a
Settlement Agreement with the Trustee with respect to its overall
claim in the bankruptcy case. We were told at oral argument that
Comerica is no longer a party to this appeal.

27 ⁵On or about November 21, 2000, Lessor sold the building in
28 which the Leased Premises are located to First West Building 00,
LLC, a related entity. Any reference to Lessor in this
Memorandum is to the owner of the building at the relevant time.

1 Debtor filed a voluntary chapter 11 petition on November 16,
2 2000; the case was converted to chapter 7 by order entered
3 November 29, 2000, and Nancy L. James was appointed as the
4 chapter 7 trustee ("Trustee").

5 Almost immediately, the Trustee moved for rejection of the
6 Lease pursuant to § 365. During the first week of December,
7 Debtor vacated the Leased Premises. The Lease was rejected by
8 order entered December 15, 2000.

9 In the meantime, on December 13, 2000, Lessor re-let the
10 Leased Premises to a new tenant, Bidpath Corporation ("Bidpath"),
11 under a new lease agreement ("Mitigation Lease") with a five-year
12 term ending December 31, 2005. The annual rent under the
13 Mitigation Lease, which started at \$30.00 per square foot and
14 increased through the term of the Mitigation Lease until it
15 reached \$34.00 per square foot in Year 5, exceeded the annual
16 rent under the Lease. The aggregate rent due under the
17 Mitigation Lease was \$5,239,857.

18 Beginning in June 2001, however, Bidpath encountered
19 difficulty meeting its payment obligations under the Mitigation
20 Lease. On October 11, 2001, Lessor entered into a settlement
21 agreement ("Settlement Agreement") with Bidpath, pursuant to
22 which Lessor released Bidpath from its obligations under the
23 Mitigation Lease in exchange for a forfeiture of Bidpath's
24 security deposit and a stock purchase warrant ("Stock Purchase
25 Warrant") which entitled Lessor, for a period of ten years, to
26 purchase 195,122 shares of Bidpath stock for a total exercise
27 price of \$1.95. By July 2002, Bidpath itself had ceased its
28 business operations and was in liquidation.

1 The Trustee commenced an adversary proceeding to recover the
2 Security Deposit on August 6, 2001.⁶ The amended complaint
3 asserted causes of action for turnover, declaratory relief, an
4 accounting, breach of contract, and conversion. In its answer,
5 Lessor denied the allegations and sought dismissal for failure to
6 state a claim upon which relief could be granted.⁷

7 On October 20, 2006, the Trustee filed her motion for
8 summary judgment ("Trustee's Summary Judgment Motion"), asserting
9 that because Debtor had been released from its obligations under
10 the Lease when Lessor had achieved complete mitigation by
11 entering the Settlement Agreement with Bidpath, Lessor breached
12 the Lease by failing to refund the Security Deposit. On October
13 24, 2006, Lessor filed its cross-motion for summary judgment
14 ("Lessor's Summary Judgment Motion"),⁸ asserting that the Trustee

15
16 ⁶At the commencement of trial of this matter in July 2002,
17 the bankruptcy court ruled that it lacked jurisdiction over the
18 Trustee's claim for recovery of the portion of the Security
19 Deposit that Debtor had provided to Lessor in the form of the
20 Letter of Credit. After hearing from some witnesses, the
21 bankruptcy court dismissed the adversary proceeding on Lessor's
22 motion. On appeal, the Ninth Circuit affirmed the district
23 court, which had reversed the bankruptcy court, and remanded for
24 further proceedings. See James v. First Ave. West Bldg., LLC (In
25 re Onecast Media, Inc.), 439 F.3d 558 (9th Cir. 2006). Following
26 remand the parties filed the cross-motions for summary judgment
27 which constitute the subject of the present appeal.

28 ⁷The answer also asserted as an affirmative defense that the
complaint should be dismissed based on the Trustee's failure to
mitigate damages.

⁸Lessor alternatively sought judgment as a matter of law
under Fed. R. Civ. P. 52(c) on the basis that the Trustee had not
sustained her burden of proof on the causes of action in the
complaint when she rested her case at the July 2002 trial. The

(continued...)

1 could not establish that Lessor breached the Lease by retaining
2 the Security Deposit.

3 The bankruptcy court determined that paragraph 20(d) of the
4 Lease provided both that Debtor's obligation to pay rent under
5 the Lease remained despite the termination of its right to
6 possession of the Leased Premises, and that Lessor was required
7 to use reasonable efforts to re-let the Leased Premises in
8 mitigation of its damages. The bankruptcy court further
9 determined that paragraph 20(b) of the Lease expressly provided
10 that,

11 If the consideration collected by the [Lessor] upon any
12 such reletting plus any sums previously collected from
13 [Debtor] are not sufficient to pay the full amount of
all rent [under the Lease], [Debtor] shall pay [Lessor]
the amount of any such deficiency.

14 Concluding that, under Washington law, Lessor's damages far
15 exceeded the amount of the Security Deposit, the bankruptcy court
16 denied the Trustee's Summary Judgment Motion and granted the
17 Lessor's Summary Judgment Motion. The Trustee filed a timely
18 Notice of Appeal.

20 II. JURISDICTION

21 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
22 §§ 1334 and 157(b)(1) and (b)(2)(A), (E), and (O). We have
23 jurisdiction pursuant to 28 U.S.C. § 158.

24
25
26 _____
27 ⁸(...continued)
28 bankruptcy court did not address this motion when it granted
Lessor's Summary Judgment Motion and dismissed the adversary
complaint.

1 **III. ISSUES**

2 Whether the bankruptcy court erred in ruling, as a matter of
3 law, that Lessor's release of Bidpath from obligations under the
4 Mitigation Lease by means of the Settlement Agreement did not
5 effect a release of Debtor's payment obligations under the Lease.

6 Whether the bankruptcy court erred in ruling, as a matter of
7 law, that the Stock Purchase Warrant did not constitute a
8 substitute for all future rent due under the Mitigation Lease.

9
10 **IV. STANDARDS OF REVIEW**

11 We review summary judgment orders de novo. Tobin v. San
12 Souci Ltd. P'ship (In re Tobin), 258 B.R. 199, 202 (9th Cir. BAP
13 2001). Viewing the evidence in the light most favorable to the
14 non-moving party, we must determine "whether there are any
15 genuine issues of material fact and whether the trial court
16 correctly applied relevant substantive law." Id.

17 We review a bankruptcy court's conclusions of law de novo.
18 In re Woodson Co., 813 F.2d 266, 270 (9th Cir. 1986).

19
20 **V. DISCUSSION**

21 We are asked to determined whether, under Washington law,
22 the Debtor is entitled to a refund of the Security Deposit. In
23 pursuing the return of the Security Deposit on behalf of the
24 Debtor's bankruptcy estate, the Trustee asserts, in the
25 alternative, that as of October 11, 2001:

26 1. Lessor's Settlement Agreement with Bidpath terminated
27 Debtor's obligations under the Lease; or

28 2. the Stock Purchase Warrant constituted a substitution

1 for all future rent due under the Mitigation Lease; or

2 3. in taking the Stock Purchase Warrant, Lessor
3 was acting in its own behalf and not in mitigation, such that
4 there was an acceptance of Debtor's surrender of the Leased
5 Premises by operation of law.

6
7 A. Lessor's Claims Under the Lease After Debtor's November 2000
8 Breach

9 1. Neither Debtor's November 2000 breach of the Lease nor
10 the § 365 rejection eliminated Lessor's claims under
11 the Lease.

12 Paragraph 20(a) of the Lease provides that, upon Debtor's
13 breach, Lessor could "at its election," either terminate the
14 Lease or terminate only Debtor's right to possession, without
15 terminating the Lease. It is clear from the record that Lessor
16 did not elect to terminate its rights and remedies under the
17 Lease.

18 First, the Lease required that termination based on Debtor's
19 breach be express and written. Paragraph 20 of the Lease
20 provides:

21 No act or thing done by [Lessor] or its agents during
22 the Term⁹ shall be deemed a termination of this Lease
23 or an acceptance of the surrender of the Premises, and
24 no agreement to terminate this Lease or accept a
25 surrender of said Premises shall be valid unless in
26 writing signed by [Lessor].

27 Although Lessor sent a Notice of Default on November 6, 2000,

28 ⁹As noted previously, the "Term" of the Lease was "[f]ive
(5) years two (2) months beginning on the Commencement Date,
ending on the Termination Date." The "Termination Date" was
October 31, 2005.

1 after Debtor failed to pay its obligations under the Lease for
2 November 2000, Lessor did not serve a notice of termination of
3 the Lease based upon this breach.

4 Further, as the bankruptcy court concluded, rejection of the
5 Lease pursuant to § 365 "constituted a breach rather than a
6 termination of the Lease," for purposes of considering Lessor's
7 claims. We agree.

8 As relevant to the rejection of the Lease, § 365(g) provides
9 that "the rejection of an . . . unexpired lease of the debtor
10 constitutes a breach of such . . . lease . . . immediately before
11 the date of the filing of the petition." See First Ave. West
12 Bldg., LLC v. James (In re OneCast Media, Inc.), 439 F.3d 558,
13 563 (9th Cir. 2006) ("[T]he rejection of Debtor's unexpired lease
14 constitutes a pre-petition breach of the lease agreement leaving
15 Creditor with potential remedies under applicable state law. The
16 statutory breach of contract simply put the estate in the
17 position of a breaching party to the executory contract.");
18 Anderson v. Elm Inn, Inc. (In re Elm Inn, Inc.), 942 F.2d 630
19 (9th Cir. 1991) (a debtor's possessory interest in leased
20 property terminates upon rejection).

21 Under § 365(d)(4), upon rejection of an unexpired lease of
22 nonresidential real property under which the debtor is lessee,
23 "the trustee shall immediately surrender that nonresidential real
24 property to the lessor." As recognized by the Ninth Circuit,
25 such required surrender "has the effect of terminating the
26 enterprise that operates there." Sea Harvest Corp. v. Riviera
27 Land Co., 868 F.2d 1077, 1080-81 (9th Cir. 1989). However, that
28 does not mean necessarily that the lease "terminates" and

1 eliminates the rights and remedies of the lessor.¹⁰

2
3 2. Debtor's bankrupt estate remains subject to a claim for
4 payment of rent under the Lease to the extent not
5 mitigated by Lessor.

6 Paragraph 20(d)(I) of the Lease provides:

7 Upon any termination of [Debtor's] right to possession
8 only without termination of the Lease, [Lessor] may, at
9 [Lessor's] option, enter into the Premises, remove
10 [Debtor's] signs and other evidences of tenancy, and
11 take and hold possession thereof . . . without such
12 entry and possession terminating the Lease or releasing
13 [Debtor], in whole or in part, from any obligation,
14 including [Debtor's] obligation to pay the rent,
15 including any amounts treated as additional rent
16 hereunder for the full Term.

17 Thus, although Debtor surrendered the Leased Premises, it
18 remained obligated for the payment of rent under the Lease.¹¹

19 Paragraph 20(d)(ii) of the Lease, however, expressly
20 required Lessor to mitigate its damages by re-letting the Leased
21 Premises, and further provided that if the consideration
22 "collected" by Lessor as a result of re-letting the Leased
23 Premises, plus the sums collected from Debtor, were not
24 sufficient to pay the full amount of the rent due under the
25 Lease, Debtor was responsible for any deficiency.

26 ¹⁰The Bankruptcy Code recognizes that a lessor may have a
27 surviving claim for damages, even if such claim results from the
28 termination of a real property lease. See § 502(b)(6) (capping a
lessor's claim for damages "resulting from the termination of a
lease of real property."). But see Port Angeles Waterfront
Assoc. v. Port of Port Angeles (In re Port Angeles Assoc.), 134
B.R. 377 (9th Cir. BAP 1991).

¹¹Debtor's response to the Notice of Default, dated November
8, 2000, reflects its understanding that it remained bound for
the payment of rent under the Lease.

1 This contractual duty of mitigation is consistent with
2 Washington law. See Exeter Co. v. Samuel Martin Ltd., 105 P.2d
3 83, 85 (Wash. 1940); Family Med. Bldg. Inc. v. Dept. of Soc. &
4 Health Svcs., 702 P.2d 459, 464 (Wash. 1985).

5
6 B. The Settlement Agreement Did Not Operate to Terminate
7 Debtor's Obligations Under the Lease

8 Consistent with its duty to mitigate under paragraph
9 20(d)(ii) of the Lease, Lessor, promptly upon rejection of the
10 Lease, entered into the Mitigation Lease, which had both a
11 greater rent and a longer term than the Lease. The parties agree
12 that had Bidpath performed fully under the Mitigation Lease, the
13 Security Deposit would be refundable. Unfortunately for all
14 parties concerned, Bidpath breached the Mitigation Lease during
15 its first year.

16 In response to Bidpath's breach, after extended
17 negotiations, Lessor entered into the Settlement Agreement with
18 Bidpath, pursuant to which Lessor terminated the Mitigation Lease
19 and released Bidpath from its obligations under the Mitigation
20 Lease.¹²

21 The Trustee contends that when Lessor released Bidpath from
22 any liability under the Mitigation Lease, Lessor also released
23 Debtor from its obligations under the Lease. The Trustee posited
24 various theories for this result, which the bankruptcy court
25

26 ¹²The Settlement Agreement by its express terms terminated
27 the Mitigation Lease. We are not persuaded by Lessor's assertion
28 that the parties actually meant "modified," but used "terminated"
only to satisfy Bidpath's investors, who insisted the Mitigation
Lease be terminated.

1 rejected. First, relying on an Oregon case, U.S. Nat'l Bank v.
2 Homeland, Inc., 631 P.2d 761, 765 (Or. 1981), the Trustee argued
3 that when Lessor re-let to Bidpath in mitigation, Debtor's status
4 in relation to Bidpath became one in the nature of assignor to
5 assignee. The Trustee then asserted that as assignee, Bidpath
6 assumed primary responsibility for payment of rent to Lessor, and
7 Debtor remained responsible to Lessor for rent under the Lease
8 only if Bidpath did not pay. Thus, the Trustee's argument
9 continued, because it is a fundamental principle of assignment
10 law that release of an assignee also releases the assignor,
11 Lessor's release of Bidpath in the Settlement Agreement
12 necessarily released Debtor.

13 We decline to apply the law of assignment in the mitigation
14 context. Unlike an assignment, mitigation involves entirely
15 different leases, each with different rights and duties. No
16 assignor-assignee relationship existed between Debtor and/or the
17 Trustee, in behalf of Debtor's bankruptcy estate, and Bidpath.

18 We also disagree with the Trustee's contention that Lessor's
19 duty to mitigate created a nexus between the Lease and the
20 Mitigation Lease. Through this argument, the Trustee attempts to
21 transmute Bidpath further from assignee to surety. The
22 Mitigation Lease created no rights in Debtor or Debtor's
23 bankruptcy estate. To hold otherwise would expose a mitigation
24 tenant potentially to liability to an original breaching tenant.

25 In her opening brief on appeal, without citation to any
26 authority, the Trustee asserts:

27 The termination of the [Mitigation] Lease is a critical
28 fact in this case because [Lessor's] acceptance of
consideration from Bidpath in full satisfaction of its
obligation to pay \$4.2 million in remaining rent shows
that [Lessor] received consideration sufficient to pay

1 the full amount of remaining rent due under the
2 [Lease].

3 (emphasis added).

4 Under Washington law, when a lessor mitigates by re-letting
5 premises, the original tenant is entitled to an offset against
6 its obligations to the lessor only in the amount of funds
7 actually received by the lessor. See Harges v. Mel-Mad Corp.,
8 730 P.2d 76, 81 (Wash. Ct. App. 1986). In addition, paragraph
9 20(d)(ii) of the Lease incorporates this general principle by
10 crediting against Debtor's obligations the consideration
11 "collected by" Lessor upon re-letting. Finally, the Trustee's
12 position is inconsistent with the reality of settlements
13 generally. It is not uncommon for parties to accept in
14 settlement sums which are less than amounts that would make them
15 "whole."

16
17 C. The Stock Purchase Warrant Did Not Constitute a Substitution
18 For Future Rent Due Under the Mitigation Lease

19 Under the Settlement Agreement, the Stock Purchase Warrant
20 expressly constituted part of the consideration for both the
21 termination of the Mitigation Lease, and Lessor's release of
22 Bidpath from all obligations, i.e., future rent, under the
23 Mitigation Lease. The Trustee asserts that because the future
24 rent forgiven in the Settlement Agreement was in the amount of
25 \$4,286,619.56, that conclusively establishes the value of the
26 Stock Purchase Warrant. Because this value, plus the amount
27 previously paid under the Mitigation Lease, exceeds the total
28 rent obligation remaining under the Lease, the Trustee asserts

1 that full mitigation has occurred such that the Security Deposit
2 is fully refundable.

3 However, the Trustee's purported valuation is inconsistent
4 with the record before the bankruptcy court. Bidpath's board of
5 directors set the value of its stock at \$.03/share at the time it
6 authorized the issuance of the Stock Purchase Warrant. Thus, as
7 asserted by Lessor, at the time it accepted the Stock Purchase
8 Warrant, it had a value of \$5,854 based on the 195,122 shares
9 covered by the Stock Purchase Warrant.

10 More importantly, as stated by the bankruptcy court:

11 One thing that struck me as unusual here is that we
12 don't have to [resort] to any valuation rules or
13 speculations as to future rent or any presumptions
because we have the benefit of knowing, up to a point,
exactly what happened.

14 "Exactly what happened" in terms of the value of the Stock
15 Purchase Warrant is that Bidpath ceased doing business in July
16 2002, which made the Stock Purchase Warrant worthless from that
17 point forward. Further, this adversary proceeding has been
18 pending long enough that the termination date under the Lease,
19 October 31, 2005, has passed. Thus, for purposes of mitigation,
20 we know with certainty that Lessor received no consideration
21 under the Stock Purchase Warrant which can be credited against
22 Debtor's obligations under the Lease.

23
24 D. Trustee's Assertion that Lessor Acted On Its Own Behalf in
25 Accepting the Stock Purchase Warrant

26 As an alternative argument to support her contention that
27 acceptance of the Stock Purchase Warrant terminated the Lease,
28 the Trustee reiterates that Lessor had two options under

1 Washington law when Debtor breached the Lease. Lessor could
2 either terminate the lease and re-let on its own account, or re-
3 let in mitigation on Debtor's behalf. As we determined above,
4 Lessor did not affirmatively elect to terminate the Lease.

5 The Trustee now asserts, for the first time on appeal, that
6 Lessor's actions both in taking and in not disclosing the Stock
7 Purchase Warrant, were inconsistent with its stated intent to act
8 to mitigate Debtor's obligations under the Lease. Relying on
9 Pague v. Petroleum Prods., Inc., 461 P.2d 317, 320 (Wash. 1969),
10 reh'g denied (1970), the Trustee contends that Lessor therefore
11 should be deemed to have resumed possession of the Leased
12 Premises for its own benefit, with the result that Debtor's
13 obligations under the Lease were terminated.

14 Because the Trustee did not raise this argument before the
15 bankruptcy court, we will not consider it now. See In re E.R.
16 Fegert, Inc., 887 F.2d 955 (9th Cir. 1989). In fact, not only
17 did the Trustee not raise the issue before the bankruptcy court,
18 she stated in her response to the Lessor's Summary Judgment
19 Motion:

20 [T]he Trustee does not contend that [Lessor's]
21 mitigation efforts were insufficient. Indeed, they
were very successful.

22 The Trustee then proceeded to assert that her only objections
23 with respect to the Settlement Agreement and the Stock Purchase
24 Warrant were that Lessor failed to account to Debtor for the
25 consideration it had received and for not releasing Debtor's
26 obligation for future rent based on such receipt. We previously
27 have addressed those objections.

1 E. Summary Judgment Is Appropriate Where Lessor's Unmitigated
2 Damages Under the Lease Exceed the Amount of the Security
3 Deposit

4 As set forth above, paragraph 20(d)(ii) of the Lease
5 provides that if the consideration "collected" by Lessor as a
6 result of re-letting the Leased Premises plus the sums collected
7 from Debtor are not sufficient to pay the full amount of the rent
8 due under the Lease, Debtor is responsible for any deficiency.
9 The bankruptcy court found the deficiency Debtor owed under the
10 Lease to be in excess of \$4 million, an amount substantially
11 greater than the amount of the Security Deposit. Accordingly,
12 the bankruptcy court held that the Trustee was not entitled to
13 turnover of the Security Deposit.

14 Ultimately, however, summary judgment is appropriate only
15 where there is no genuine issue as to any material fact. Fed.
16 R. Civ. P. 56. The parties used as factual support for the
17 cross-motions only evidence that was available at the July 2002
18 trial.

19 The Trustee's Summary Judgment Motion specifically alerted
20 the bankruptcy court that the record on summary judgment
21 contained no evidence of amounts Lessor collected in mitigation
22 between July 2002 and October 31, 2005, the termination date
23 under the Lease. Despite the testimony in the summary judgment
24 record regarding the downturn in the leasing economy both at the
25 time the Settlement Agreement was entered into and subsequent
26 thereto, suggesting it is doubtful that Lessor was successful in
27 achieving full or even significant mitigation by further re-
28 letting the Leased Premises, a genuine issue of material fact did
exist as to whether, upon final accounting through the end of the

1 Term of the Lease, any deficiency Debtor owed under the Lease
2 exceeded the amount of the Security Deposit.

3 At oral argument before the Panel, however, the Trustee's
4 counsel conceded that if the Panel did not accept Trustee's
5 assertion that Lessor had achieved complete mitigation, by virtue
6 of either the Settlement Agreement or the Stock Purchase Warrant,
7 any accounting would establish that Lessor's unmitigated damages
8 exceeded the amount of the Security Deposit by a substantial
9 margin. Accordingly, we deem withdrawn any assertion of error
10 based on the bankruptcy court's finding that no genuine issue of
11 material fact existed to preclude entry of summary judgment in
12 favor of the Lessor.

13 14 **VI. CONCLUSION**

15 The bankruptcy court did not err in its determination that
16 the Settlement Agreement did not terminate Debtor's obligation to
17 pay rent under the Lease. Neither did the bankruptcy court err
18 when it determined that, in accepting the Stock Purchase
19 Agreement, Lessor did not accept substitute consideration valued
20 at the full amount of the remaining rent due under the Mitigation
21 Lease. Any issue that the bankruptcy court erred as a matter of
22 law when it ruled on the cross-motions without a factual record
23 for establishing the amount of consideration collected by Lessor
24 from re-letting the Leased Premises through October 31, 2005, in
25 mitigation of Debtor's obligations under the Lease, has been
26 withdrawn.

27 We AFFIRM.
28