PREPARED BY THE COURT

ABRAMSON-OBAL, LLC, Plaintiff, v. SUKETU SHAH & KEDAR SHAH, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO: BER-L-7636-17 **ORDER OF JUDGEMENT**

THIS MATTER having been opened to the court by plaintiff Abramson-Obal, LLC (Jeffrey R. Kuschner, Esq. appearing) and defendants Suketu Shu and Kedar Shah (Michael J. Forino, Esq. of Archer & Greiner PC appearing) and this matter having come for a bench trial on November 4, 6, 7, and 12, 2019; and the parties having presented testimony and documentary evidence; and made oral arguments; and for the reasons set forth on the record by the Court and for good cause shown;

IT IS on this 28th day of February, 2020, ORDERED:

1. Judgement be entered in favor of the defendants Suketu Shah and Kedar Shah and against plaintiff Abramson-Obal, LLC denying an award of damages.

2. Judgement be entered in favor of the defendants Suketu Shah and Kedar Shah and against plaintiff Abramson-Obal, LLC denying an award of attorneys' fees and costs.

3. Judgment be entered in favor of the plaintiff Abramson-Obal, LLC and against defendants Suketu Shah and Kedar Shah denying the return of the security deposit in the amount of $24,000.

4. **IT IS FURTHER ORDERED** that a copy of this Order shall be deemed served on all parties upon entry and posting to eCourts.

Hon. Avis Bishop-Thompson, J.S.C.

RIDER ATTACHED

NOT TO BE PUBLISHED WITHOUT

THE APPROVAL OF THE COMMITTEE ON OPINIONS

ABRAMSON-OBAL, LLC, Plaintiff, v. SUKETU SHAH & KEDAR SHAH, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO: BER-L-7636-17 **OPINION**

This Court conducted a bench trial on November 4, 6, 7 and 12, 2019 regarding a commercial landlord-tenant dispute between plaintiff Abramson-Obal, LLC and defendants Kedar Shah and Suketu Shah, the personal guarantors of the commercial lease. Plaintiff filed a single-count Summons and Complaint on November 8, 2017 alleging breach of contract (lease, settlement, guaranty and reaffirmation of guaranty) seeking base rent, additional rent, deferred rent and unamortized broker's commissions from May 2017 to September 2019. Defendants assert that plaintiff is not entitled to damages. Defendants further assert that assuming plaintiff is entitled to damages, then payment is limited to no more than one year's rent and an offset is due because of plaintiff's retention of the security deposit and monies received from sale of the restaurant assets and equipment. The parties stipulated that liquidated damage are not at issue. For the reasons expressed below, plaintiff is not entitled to damages in the amount of $416,294.75 or attorneys' fees. Defendants are not entitled to the return of the $24,000 security deposit paid to plaintiff.

I. Findings of Fact

Plaintiff owns a 13,200 sq. ft commercial property located at 405 Midland Avenue in Saddle Brook comprised of Bennigan's at 7,200 sq. ft. and Steak & Ale at 5,500 sq. ft. In 2008,

Bennigan's declared bankruptcy and vacated the property which was vacant from 2008 through 2011.[1] The Steak & Ale space had been vacant from 2008 through the present.

The Steak & Ale space was initially marketed by Silbert Realty, a predominately commercial real estate broker from central New Jersey. Plaintiff paid Silbert $93,000 in unamortized brokers commission for securing Bennigan's Saddlebrook as a tenant.

On August 6, 2013, plaintiff signed an exclusive listing agreement with The Goldstein Group in which plaintiff agreed to pay the listing agent a five percent commission upon the execution of a lease with or without a cooperating agent. On October 11, 2017, the listing agreement was amended to provide for payment of a four percent commission in the event of a sale of the property.

On November 9, 2011, plaintiff entered into a twenty-year written lease agreement (Lease) with Bennigan's Saddlebrook, LLC for the commercial space formerly occupied by Bennigan's. The Lease set forth all the terms and conditions. Pursuant to Article III, "Rent", the parties agreed to a rent schedule that encompassed basic rent and additional rent. Article VII, "Additional Rent, Real Estate Taxes, Utilities and Common Area Maintenance (CAM) Expenses" were also identified. The parties agreed that "tenant's proportionate share of all real estate taxes, utilities and CAM charges shall be 55%". Article XXX, "Personal Guaranty", provides that defendants personally guaranty the first twenty-nine months from Rent Commencement. During that time, defendants guarantee all of the terms and conditions of the Lease. Thereafter, defendants shall provide a "good guy" guaranty. The article also provides that '[d]uring the first ten Lease years, the Guarantors also shall guaranty the unamortized commission paid to the Broker by the Landlord as of the time of the default (except that for purposes of the Guaranty, the commission shall be

[1] In or around July 2008, Bennigan's the parent company filed for bankruptcy and the locations were closed.

amortized over a ten (10 years period). Exhibit D to the Lease, "Guaranty of the Lease", acknowledged and signed by defendants wherein they committed to the personal guarantee of all of the terms, covenants and conditions of the Lease on behalf of Bennigan's Saddlebrook. Such unconditional obligation included the obligation to pay basic rent and additional rent. Pursuant to the terms of the Guaranty, the defendants obligations under the Guaranty would only cease if at the time of the termination of tenancy, there had been… "(d) the full payment of all Rent and Additional Rent due to the date of such vacation [of the Premises]". Defendants also guaranteed to repay landlord the unamortized cost of the commission payable to the real estate broker, "which commission shall be fully amortized over the first ten [10] Lease Years".

The build-out of the property occurred in 2011. Bennigan's Saddlebrook was issued a certificate of occupancy in July 2013. Bennigan's Saddlebrook engaged in litigation with a contractor. A lien was filed on the property. A settlement was reached, and the lien was released. On October 16, 2014, the parties entered into an agreement entitled "Amendment to the Lease and Settlement Agreement" wherein the parties agreed to the temporary rent reduction for twelve (12) months to be repaid over thirty (30) months. In or on the same date, defendants entered into an agreement entitled "Amendment to and Reaffirmation of Guaranty." The Reaffirmation Guaranty added the obligation of the defendants to pay any unpaid deferred rent until all deferred rent had been paid in full.

In January 2017, plaintiff received notice of the Chapter 11 bankruptcy filing. Plaintiff retained the law firm of Lowenstein Sandler for the bankruptcy matter.

On May 10, 2017, Bennigan's Saddlebrook filed for Chapter 11 bankruptcy which was converted to a Chapter 7 proceeding.

On May 15, 2017, plaintiff served Bennigan's Saddlebrook with a Notice of Default. The bankruptcy trustee terminated the lease. Defendants surrendered the keys to Bennigan's Saddlebrook's attorney pursuant to the terms of the Chapter 7 bankruptcy liquidation. Plaintiff retained Bennigan's Saddlebrook's security deposit in the amount of $24,000. Plaintiff secured the property, emptied the dumpster, cleaned and removed garbage from the interior. Thereafter, plaintiff retained The Goldstein Group to market the property based upon the company's experience and presence in northern New Jersey.

Security Deposit and Asset/Equipment Retention

Plaintiff regained possession of the property on June 7, 2019. The property left in Bennigan's Saddlebrook was deemed abandoned by the Bankruptcy Trustee and the lender, as such, plaintiff had the option to either sell or auction off the equipment. Plaintiff auctioned the majority of Bennigan's Saddlebrook's restaurant assets and equipment and received approximately $25,000. Plaintiff did not provide notice to Bennigan's Saddlebrook or defendants of the intention to sell or auction the property. Plaintiff also retained the $24,000 security deposit made by Bennigan's Saddlebrook.

Brothers BBQ Group

On July 1, 2017, plaintiff received a letter of intent (LOI) offering to lease the premises from Brothers BBQ Saddle Brook, LLC and D.B.A. Brothers BBQ (collectively Brothers BBQ). The Brothers BBQ offered to pay rent within the range expected by plaintiff. On July 8, 2017, Brothers BBQ signed a LOI for a ten-year initial term for approximately 13,219 sq. ft. at $9 sq. ft base rent for years 1-5 and $10.08 sq. ft for years 6-10. The LOI set forth two five-year renewal options at $11.59 sq. ft for years 11-15 and $13.33 sq. ft. for years 16-20. Plaintiff was to pay the broker commission pursuant to a separate agreement.

On August 4, 2017, the parties signed a LOI for approximately 10,000 sq. ft. with an initial term of 10 years with graduated increase in base rent starting at $11.50 sq. ft to $15.50 (year 5) and a 3% annual increase from years 6-10. The LOI set two five-year renewal options with an annual rent increase during both renewal options. Plaintiff would pay the brokers commission under a separate agreement. Draft lease agreements were exchanged between the parties. Brothers BBQ agreed to a six-month personal guarantee. Subsequent to the exchange of a draft leases, plaintiff terminated the lease because of concerns about receiving municipal approval for the penetration of the fire wall and Jack Daniels Motors expression of interest in the property.

Jack Daniels Motors

On September 5, 2017, Jack Daniels presented an offer to lease the former Bennigan's space (7,300 sq. ft.) for a fifteen-year initial term at $18 per sq. ft. with ten percent rent increases every five years and three five-year renewal options. Thereafter, on September 22, 2017, Jack Daniels presented a purchase offer in the amount of $4,250,000 for the site. The purchase and sale agreement were signed on December 21, 2017. Plaintiff accepted the offer even though the purchase was contingent upon receiving final and non-appealable zoning approvals which was a more involved process that a variance to obtain a smoker. The Zoning Board approved the variance on May 7, 2018. On July 2, 2018, Jack Daniels terminated the purchase agreement because of an appeal filed by the neighboring property owner. Jack Daniels assigned its rights to plaintiff and the matter was ultimately settled.

K-9 Pet Resorts

During the lease -purchase negotiations with Jack Daniels in October 2017, plaintiff signed a LOI with K-9 Pet Resorts a pet day care and hotel for 9,219 rentable sq. ft. plus approximately 4,000 of contiguous space for outdoor play area. The LOI set forth terms for a ten-year term with

two ten-year options at $15 per sq. ft. Plaintiff terminated the negotiations on the basis that the dog day care would hinder the leasing of the adjourning space to a restaurant.

Between December 2017 and July 2018, all marketing activities related to the property were suspended. In July 2018, Goldstein Group was instructed to resume marketing by plaintiff.

Prospective Purchasers

Meadowlands Transportation Corporation agreed to purchase the site for $5,525,000 in October 2017, but plaintiff did not agree to the revised terms and negotiations terminated. On December 13, 2018, Coremark signed a LOI to purchase approximately 4.2 acres for $4,500,000; however, the intended use was not disclosed to plaintiff. In January 2019, PSE&G expressed interest in the property for equipment storage. Gas or convenience store Quick and WaWa (December 2018), Coremark (use not revealed in January 2019) and D & M Tours (bus storage January 2019). In February 2019, D&M tours submitted a LOI to purchase the property for $4,500,000 for bus storage. Sitez Group submitted a LOI for $2,500,000 which was rejected by the plaintiff as a "low-ball" offer. On May 28, 2019, a LOI was presented by Zoltek Realty for $4,650,000 for the entire site. On October 10, 2019, plaintiff entered into a purchase agreement with Greater Bergen Association of REALTORS for $4,625,000 for the entire Property.

II. Decision

A. Mitigation of Damages

In New Jersey, a commercial lessor may recover for lost rental income resulting from a tenant's breach of a lease; however, the recovery is subject to the landlord's duty to mitigate. McGuire v. City of Jersey City, 125 N.J. 310, 320-21 (1991); Fanarjian v. Moskowitz, 237 N.J. Super. 395, 405-06 (App.Div.1989); Harrison Riverside Ltd. P-Ship v. Eagle Affiliates, Inc., 309 N.J. Super. 470 (1998).

The burden of proof is on the commercial landlord. As a landlord, the duty to mitigate requires that a reasonably adequate replacement tenant be found. The landlord [is in] a better position to demonstrate whether he exercised reasonable diligence in attempting to re-let the property. Sommer v. Kridel, 74 N.J. 446, 457 (1997). In determining whether landlord exercised reasonable diligence, the factfinder should weigh "whether the landlord, either personally or through an agency, offered or showed the [premises] to any prospective tenants, or advertised it in local newspapers." Ibid. The issue is fact-sensitive and "there is no standard formula for measuring whether the landlord has utilized satisfactory efforts in attempting to mitigate damages, and each case must be judged upon its own facts." Id. at 459.

In support of plaintiff's claim for damages, Andrew Abramson, one of plaintiff's principals, offered testimony regarding the lease negotiations for the Bennigan's Saddlebrook space. The court gleaned from Abramson's testimony that the property was difficult to lease because Saddle Brook is a tertiary market and a less than ideal site based upon the traffic pattern and location. Also, Bennigan's Saddlebrook was twice the size of the typical family space, i.e. 3,800 sq. ft. Theme style restaurants were no longer in vogue. Finally, there was no interest in the Steak & Ale space up to 2017 but became more pronounced in 2017.

Abramson's testimony cannot be reconciled with the documentary evidence submitted in support of plaintiff's position. Namely, plaintiff made no effort to find a tenant between January 2017 and June 2017. The court also found Abramson to be less than credible regarding efforts to find a reasonable adequate replacement restaurant tenant. Between October 2018 and January 2019 various restaurants were interested in the Bennigan's space. But, the many prospective tenants found the space insufficient and not of good quality because the interior had been gutted of restaurant equipment and asserts. Thus, with the exception of Brothers BBQ, potential

restaurant tenants turned down the location when they were advised that the restaurant equipment had been removed.[2]

Abramson's testimony was also inconsistent regarding the determination to terminate lease negotiations with Brothers BBQ. Abramson testified that he consulted with his partner or counsel prior to making a decision. However, on cross-examination contradicted the testimony by stating that he alone made the decision to reject the Brothers BBQ offer based on a concern that Brothers BBQ would not get municipal approval. Initially, Abramson was also evasive in his response as to whether the Brothers BBQ's proposal was acceptable, he then reluctantly acknowledged that the terms were somewhat favorable to plaintiff although the rent offered was less than he was asking. Plaintiffs had not made the asking rent known in marketing materials.

Abramson's testimony also established an unawareness of the scope of the marketing efforts. Although Abrahamson signed the Listing Agreement with the Goldstein Group, he only saw advertisements on their websites and emails from Charles Lanyard. Plaintiff testified that he had no idea of the marketing efforts made by the Goldstein Group. However, the emails offered by plaintiff do not predate January 2019.

Equally less credible is the testimony of Charles Lanyard as exclusive listing agent. Lanyard has the inherent conflict because of the financial interest in the outcome of this case based upon the commission clause for the lease and/or purchase as provided for in the Listing Agreements signed on August 6, 2013 and October 11, 2017. The commission goes beyond that of a fee charged by an expert retained solely to render an expert opinion in the case.

[2] The following restaurants expressed no interest in the Property: Mexican restaurant operator (November 2018 – 7,000 sq. ft), Joe Keys restaurant broker (December 2018 – 7,000 sq. ft), Franco D (December 2018 – 7,000 sq. ft), and Robert Kenny broker (January 2019 – 7,000 sq. ft). Other potential restaurant tenants also expressed no interest due to the costly build out when advised that the Property did not have little equipment and fixtures.

However, this court does give weight to Lanyard's testimony regarding the description of the property and the Brothers BBQ lease negotiations. Based upon Lanyard's rest estate experience but not market data, he opined that the property could only be utilized as a restaurant. He further testified that Brothers BBQ would have been a good or ideal tenant for the property because it is a secondary or tertiary type restaurant and not a national chain. Lanyard also explained that the lower rent was considered a discounted rate for an "as-is" deal because refurbishing was required for the space. Consistent with Abramson's testimony, Lanyard testified that Brothers BBQ offered to pay rent in the range expected by plaintiff even though the market rate was lower that what Bennigan's Saddlebrook was paying. Further, a typical small owner would probably only commit to a five-year lease with some reasonable extension.

Thereafter, Lanyard was directed to market the property for sale because there was concern about finding a restaurant tenant. Abramson set the sale price for the property at $5 million dollars without a liquor license. The sale price would be $5,250,000 with a liquor license which had a value of $200,000. Lanyard did not conduct an independent assessment was conducted to determine if the sale price was consistent with the market.

Kedar Shah

Defendant Kedar Shah testified that there many restaurants such as Midland Brewhouse, Goodfellas and other bars, within the three-mile vicinity. Midland Brewhouse, a 10,000 sq. ft. two-story restaurant with similar fare to Bennigan's, is located across the street from the property.

At the time defendants vacated the property on May 25, 2017, all of the assets were left in good condition. The Court finds Shah believable with respect to the type of restaurants in the vicinity and the quality of the condition of the restaurant goods and assets at the time the property was vacated.

Plaintiff's argument that it has no obligation to mitigate damages pursuant to the Lease is rejected. Although Section 14.06 of the Lease governs the duty to mitigate damages, plaintiff cannot bargain away the duty to mitigate damages. Drutman Realty Company Limited Partnership v. Jindo Corp., 865 F. Supp. 1093 (S.D.N.Y. 1994). Thus, this provision is unenforceable given New Jersey's strong public policy in favor of guaranteeing that landlords mitigate damages and accepted principles of contract law. McGuire; Sommer.

The record reveals a history of inaction and indecisive actions by plaintiff's principal Abramson. Upon receiving notice of the bankruptcy filing in January 2017, plaintiff expended zero efforts in reletting the space between January and June of 2017. Although, plaintiff was marketing the space suitable for a restaurant, plaintiff had stripped the interior which presented a lease than appealing site for a reasonably adequate replacement restaurant tenant. Despite the space being devoid of any restaurant assets or equipment, Brothers BBQ was ready, willing and able to lease approximately one-half to three-quarters of the leased space. Plaintiff was also presented with the opportunity to receive rental income for space which have been vacant since at least 2008. A review of the Brothers LOI and the draft leases demonstrate that it would have been a favorable venture. The numbers show a viable rental stream of income. The difference between the ten-year lease for defendants ($1,261,584) and Brothers BBQ ($1,497,700) was $236,116 in rental income. The difference between the twenty-year lease for defendants ($2,147,760) and Brothers BBQ ($2,694,800) was $547,040 in rental income. Nevertheless, plaintiff elected to terminate the lease negotiations based upon sheer speculation. Plaintiff passed up the opportunity to lease the space at a favorable rate within the range that was demanded by the market within less than one year of Bennigan's Saddlebrook vacating the space. Plaintiff's actions were a total failure of effort to mitigate damages by securing another restaurant tenant warrants entry of judgment in

favor of the defendants on plaintiff's claim for rent due after surrender of the property. McGuire, 125 N.J. at 320-23; JS Properties, L.L.C. v. Brown and Filson, Inc., 389 N.J. Super. 542, 552 (App. Div. 2006); Harrison Riverside Ltd. P-ship; Fanarjian, 237 N.J. Super. at 404-07.

B. Damages

The same principle applied to contract breaches governs the measure of damages for breach of a lease. Ringwood Assocs., Ltd. v. Jack's of Route 23, Inc., 153 N.J. Super. 294, 309 (Law Div. 1977) (citing Cohen v. Wozniak, 16 N.J. Super. 510, 512 (Ch. Div. 1951)). "[A] party who breaches a contract is liable for all of the natural and probable consequences" resulting from the breaching party's failure to perform. Totaro, Duffy, Cannova & Co. v. Lane, Middleton & Co., 191 N.J. 1, 13 (2007).

The duty to mitigate damages relates to the amount of loss that the landlord could have reasonably avoided. Ingraham v. Trowbridge Builders, 297 N.J. Super. 72, 82 (App. Div. 1997). Mitigation of damages is a concept which takes into account the injured party's acts or failure to act when computing the amount of his recovery. White v. Township of North Bergen, 77 N.J. 538, 546 (1978). The amount of damages the landlord is entitled to recover is reduced by the sum the landlord did or could have received through mitigation. Harrison Riverside Ltd. P'ship., 309 N.J. Super. at 474.

Plaintiff asserts that defendants owe base rent, additional rent, deferred rent and unamortized broker's commission from May 2017 to September 2019 in the following amounts:

Basic Rent	$400,619.74
Additional Rent	
- Real Estate Taxes	$106,694.00
- CAM-Taxes "True Up"	2,195.53
- Common Area Maintenance	57,984.50
Deferred Rent	22,000.00
Unamortized Broker's Commission	93,000.00
TOTAL	**$416,294.74**

To establish damages, plaintiff offered the testimony of Michael Hashimoto, Vice President and Comptroller of Value Corporation. Hashimoto testified regarding the rental obligations as defined by the Lease and Guarantee identifying a total amount due of $416,294.74 from defendants. As more fully articulated under mitigation of damages, plaintiff had the opportunity to receive $236,116 more in rental income for a ten-year lease and $547,040 in rental income for a twenty-year lease had plaintiff secured Brothers BBQ as a commercial tenant. The amount exceeds any amount due and owing from defendants for the Bennigan's Saddlebrook lease. Plaintiff does not refute the rental income which could have been generated.

Plaintiff also seeks $60,879.62 representing previously omitted charges for insurance, monitoring, management fee and late charges. On cross-examination, Hashimoto testified that plaintiff had not abided by the terms of the Lease. Specifically, plaintiff failed to provide defendants with a statements pursuant to Section 7.02 F which provides in pertinent part, "…within 120 days of the end of each calendar year, Landlord shall provide a statement to Tenant setting forth Tenant's proportionate share of real estate taxes for the prior year…" The same language applies to common area maintenance expenses in Section 7.05 B which were not provided to defendants. Hashimoto testified that he did not prepare the invoices until after the litigation ensued.

Defendants' expert Lewis Eisenberg is a licensed and certified general appraiser in New Jersey. Based upon the market data research performed by Eisenberg, he opined that the rent mitigation loss and pro rata share of CAMS and real estate taxes limited to one year is $130,000. The $130,000 did not include commission or deferred rent. In forming his opinion, Eisenberg relied upon the property inspection which he determined was average to above average. Eisenberg further testified that the market data research was based upon comparable which utilized property

leases within the same market that required minimum adjustment and the market rate. Finally, he opined that the property was a very high sales price for a very good piece of real estate in the greater Bergen area. The court found Eisenberg's testimony credible based upon his experience and data research.

Even accepting the analysis performed by and the testimony of Eisenberg limiting damages to one year, plaintiff failed to mitigate damages within one year of Bennigan's Saddlebrook vacating the property. Thus, plaintiff is not entitled to recover damages for base rent, additional rent, deferred rent and unamortized broker's commission from May 2017 to September 2019. Likewise, plaintiff is not entitled to recover the omitted $60,879.62 representing charges for insurance, monitoring, management fees, and late charges. Plaintiff made no effort to provide Bennigan's Saddlebrook with corrected invoices during their tenancy up to and including through the bankruptcy. Similarly, plaintiff made no effort to provide defendants with the corrected statements immediately after Bennigan's Saddlebrook obligation was discharged due to bankruptcy. Finally, plaintiff failed to perform its obligation pursuant to the Lease because the charges were not presented within 120 days of each calendar year.

Even more troubling is the fact that plaintiff never provided notice to defendants as personal guarantors of the accruing charges. Although plaintiff had no expectation that Bennigan's Saddlebrook would pay rent and expenses between May 2017 and November 2019, plaintiff was not relieved of the obligation to provide notice of the charges and commission due to defendants as personal guarantors on a monthly basis. Plaintiff cannot passively watch the charges accrue and then wait until the commencement of litigation to seek payment.

C. Attorneys' Fees

Plaintiff seeks attorneys' fees pursuant to the terms of the Lease. This count finds plaintiff is not entitled to attorneys' fees related to the bankruptcy matter since plaintiff offered no proofs regarding any determinations made by the bankruptcy trustee with regard to the fees and costs associated with Bennigan's Saddlebrook. This court also finds that because of plaintiff's failure to mitigate damages, plaintiff is not entitled to attorney's fees and costs. See McGuire, Sommer. Consequently, plaintiff 's request for attorneys' fees is not warranted.

D. Security Deposit

Defendants seek a return of the $24,000 security deposit. As a matter of law, defendants are not entitled to same. The Security Deposit Act (SDA) requires a landlord to return the tenant's security deposit and interest accrued within 30 days after the termination of the tenant's lease less any charges expended in accordance with the terms of the lease. N.J.S.A. 46:8-21.1. If a landlord violates this requirement, the tenant may sue the landlord, and "the court upon finding for the tenant . . . shall award recovery of double the amount of said moneys, together with full costs of any action and, in the court's discretion, reasonable attorney's fees." Ibid. The SDA, by its express terms, applies to all rental premises or units used for dwelling purposes" and does not apply to commercial leases. See, e.g., Presberg v. Chelton Realty, Inc., 136 N.J. Super. 78, 84 (Passaic County Ct. 1975); N.J.S.A. 46:8-26. It is unequivocal that Bennigan's Saddlebrook is not a residential dwelling and the lease was for commercial space. Thus, plaintiff had the right to retain the security deposit which presumably covered unpaid costs from January 2017 through May 2017.

Based upon the foregoing, plaintiff is not entitled to damages comprised of base rent, additional rent, deferred rent and unamortized broker's commission from May 2017 to September 2019 based upon a failure to mitigate damages. Similarly, plaintiff is not entitled to attorneys'

fees as the non-prevailing party. Defendants are not entitled to a return of the security deposit as a matter of law pursuant to the Security Deposit Act. An Order accompanies this Opinion.

Dated: February 28, 2020

Hon. Avis Bishop-Thompson, J.S.C.