Adopting the Modern Trend

By Leon Silver

Mitigation of Damages in Commercial Lease Abandonment Cases

The commercial lease market has crashed once again and your retail landlord client has a tenant who pulls up stakes and abandons its lease. With an excess of unfilled space, your client doubts that it can re-lease the premises. What do you advise? No doubt that attorneys working in the retail and hospitality industry have faced this question. And the question becomes exponentially more difficult when dealing with a chain with locations in many states. Be careful, because in many jurisdictions a landlord cannot make a claim for unpaid rent unless it made reasonable efforts to re-lease the premises to another tenant.

Under common law, a landlord had no need to try to re-lease abandoned premises. It could in effect do nothing and sue for unpaid rent because it had no duty to mitigate its damages. *See Restatement (2d) of Prop: Landlord & Tenant*, §12.1(3) (1977) ("Except to the extent the parties to the lease validly agree otherwise, if the tenant abandons the leased property, the landlord is under no duty to attempt to relet the leased property for the balance of the term of the lease to mitigate the tenant's liability under the lease, including his liability for rent.…").

This common law view was predicated on treating a lease as a transfer of property rights rather than as a contractual exchange of promises:

> [L]eases have been historically recognized as a present transfer of an estate in real property. Once the lease is executed, the lessee's obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages.

Holy Properties Ltd., L.P. v. Kenneth Cole Prods., 87 N.Y.2d 130, 133, 637 N.Y.S.2d 964, 966, 661 N.E.2d 694, 696 (1995) (Internal citations omitted). But over time many courts have abandoned that view. *See* Glen Weissenberger, *The Landlord's Duty to Mitigate Damages on the Tenant's Abandonment: A Survey of Old Law and New Trends*, 53 Temp. L.Q. 1 (1980).

Currently, 28 states have abandoned the common law view and follow a variant of the more modern doctrine that a landlord must make reasonable efforts to mitigate its damages when a commercial tenant abandons its lease. Under this modern view, unless the landlord is "unable to secure a substitute tenant after making reasonable efforts to do so," it is not entitled to sue for unpaid rent. *Schneiker v. Gordon*, 732 P.2d 603, 612 (Colo. 1987). Fifteen states (including the District of Columbia) continue to follow the no-mitigation duty common law view. Eight states have yet to take a position on this issue in a published decision.

In this article, we discuss why courts are adopting the modern trend view. We also discuss how courts address the burden to prove mitigation efforts and we look at the kind of evidence that courts regard as proving or disproving reasonable efforts. We begin with an actual case.

An Example of Commercial Lease Abandonment

The case begins when a restaurant tenant signed a seven-year commercial lease in mall space. When its business subsequently failed two years into the lease, the tenant abandoned the lease premises. Soon after, the landlord leased a portion of the abandoned premises to another business. But a substantial part of the premises remained unleased. The record did not show what efforts, if any, the landlord made to lease the rest of the premises. It did not show, for example, whether the landlord engaged a broker or what the landlord did (if anything) to advertise the space for lease.

The landlord sued the tenant, seeking as lost rental damages the difference between the rent due from the tenant under the lease agreement and the rent that was received from re-leasing a portion of the premises. When the tenant asserted a failure to mitigate defense, the landlord argued that it had no such duty, that it had no obligation to try to re-lease the premises. It also argued that, if it did have a duty to mitigate damages, in the absence of evidence of its efforts to re-lease, it should still prevail. Why? The landlord claimed that the tenant had the burden of proving that the landlord

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failed to meet that duty because failure to mitigate was an affirmative defense. The trial court ruled in favor of the landlord, and the tenant appealed.

The Arizona Court of Appeals agreed with the landlord, ruling that the landlord did have a duty to mitigate but that this was an affirmative defense and the tenant failed to meet its burden to prove that the landlord failed to meet that duty. *See Next Gen Capital, L.L.C. v. Consumer Lending Assocs., L.L.C.*, 234 Ariz. 9, 12 ¶ 13, 316 P.3d 598, 601 (App. 2013) ("Because CLA was the breaching party, CLA'ha[d] the burden of proving that mitigation was reasonably possible but not reasonably attempted.'"). In other words, although Arizona follows the modern trend on mitigation in this context, the tenant failed to prevail because it had the burden to prove that the landlord failed to mitigate.

Importantly, not all states that follow the modern trend would have reached this result. Had this case been decided under the law of states such as Illinois, Iowa, New Jersey, Oregon, or Utah, the landlord would have had the burden to prove that it made reasonable efforts to re-lease the premises. In those states, absent evidence of mitigation, the tenant would have prevailed. So watch out!

Modern Trend

The modern trend is to view commercial leases as an exchange of promises, not much different than other contract relationships. *Wright v. Baumann*, 239 Or. 410, 413, 398 P.2d 119, 120–21 (1965) ("[A] modern business lease is predominantly an exchange of promises and only incidentally a sale of a part of the lessor's interest in the land."). Courts holding this view see no logical reason to treat a commercial lease differently than other commercial contracts:

> It is difficult to find logical reasons sufficient to justify placing [commercial] leases in a category separate and distinct from other fields of the law which have forbidden a recovery for damages which the plaintiff by reasonable efforts could have avoided. The perpetuation of the distinction between such a lease and a contract, in the application of the principle of mitigation of damages, is no longer supportable.

Bernstein v. Seglin, 184 Neb. 673, 677, 171 N.W.2d 247, 250 (1969).

As in other contract situations, these courts find compelling reasons to require landlords to try to minimize their damages. *See*, *e.g.*, *Sommer v. Kridel*, 74 N.J. 446, 457, 378 A.2d 767, 772 (1977) (referring to "the unfairness which occurs when a landlord has no responsibility to minimize damages"); *Schneiker*, 732 P.2d at 610 (explaining that public policy favors the application of damage mitigation principles because "allow[ing] the property to remain unoccupied while still holding the abandoning tenant liable for rent… encourages both economic and physical waste"). Twenty-eight states have adopted this modern trend view. *See* Table of Jurisdictions, *infra*. In five of these states (California, Delaware, Illinois, Texas, and Wisconsin), the rule is set out in statute. *See* Cal. Civ. Code §1951.2(c)(1) (limits landlord's damages by what "the lessee proves could be reasonably avoided"); Del. Code Ann., § 5507(d), Title 25 (holding in regard to residential leases, that "the landlord has a duty to mitigate damages"); 735 Ill. Comp. Stat. 5/9-213.1 ("[A] landlord or his or her agent shall take reasonable measures to mitigate the damages recoverable against a defaulting lessee."); V.T.C.A., Property Code §91.006(a) ("A landlord has a duty to mitigate damages if a tenant abandons the leased premises in violation of the lease."); Wisconsin Stat. §704.29 ("[L]andlord can recover rent and damages except amounts which the landlord could mitigate in accordance with this section.").

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In the others, it is a judge-made rule. Why do other states resist the trend and stay with the common law view of a lease? Two words: *stare decisis*.

Stare Decisis

Few courts (if any) directly state that a commercial lease relationship should be governed solely by property law. Yet many states, out of respect for *stare decisis*, continue to follow the no mitigation view that arose from such an understanding. At least fifteen states (including the District of Columbia) follow this view. *See* Table of Jurisdictions, *infra*.

In *Holy Properties*, for example, the court explained:

> [P]arties who engage in transactions based on prevailing law must be able to rely on the stability of such precedents, and that in business transactions particularly, the certainty of settled rules is often more important than whether the established rule is better than another or even whether it is the "correct" rule.

661 N.E.2d at 696.

Some states apply a mixed doctrine that lays all sorts of traps for the unwary. In these states, a lease relationship is treated as having both property and contract elements. Property law controls the relationship if the lease is in effect and contract law with its requirement to mitigate damages controls after the tenancy is terminated. *See*, *e.g.*, *K & R Realty Assocs. v. Gagnon*, 33 Conn. App. 815, 819, 639 A.2d 524, 526 (1994).

> Where the landlord elects to continue the tenancy, he may sue to recover the rent due under the terms of the lease. Under this course of action, the landlord is under no duty to mitigate damages. When the landlord elects to terminate the tenancy, however, the action is one for breach of contract; and, when the tenancy is terminated, the landlord is obliged to mitigate his damages.

Id.

In Connecticut, then, a landlord has two options. It can sit back and do nothing and sue for unpaid rent as it comes due. Or

it can take action to terminate the lease, attempt to mitigate its damages and sue for damages less what it obtained (if anything) from re-leasing.

Burden of Proof

A landlord or tenant can find, as happened in this example, that the issue of mitigation will be decided by the side that has the burden of proof. Although the general rule of mitigation puts the burden of proof on the breaching party, a developing trend, albeit still a minority view, assigns the burden of proof in the context of commercial lease abandonment to the landlord. To date, five of the 28 states that require mitigation in this context have adopted this view. See Table of Jurisdictions, *infra*. Thirteen states follow the general rule and assign the burden of proof on mitigation to the breaching party. *Id.* The remaining eight states have yet to take a position on this issue. *Id.*

There are sound reasons to assign the burden of proof on mitigation to the landlord. The New Jersey Supreme Court explained that it does so because such evidence is far more readily available to the landlord: "While generally in contract actions the breaching party has the burden of proving that damages are capable of mitigation, here the landlord will be in a *better position* to demonstrate whether he exercised reasonable diligence in attempting to re-let the premises." *Sommer v. Kridel*, 74 N.J. 446, 457, 378 A.2d 767, 773 (1977) (residential lease) (citations omitted, emphasis added); *see also McGuire v. City of Jersey City*, 125 N.J. 310, 323, 593 A.2d 309, 316 (1991) (commercial lease).

The Oregon Court of Appeals takes a similar view. It assigned the burden of proof to the landlord because the relevant facts are "peculiarly within [its] knowledge." *Portland Gen. Elec. v. Hershiser, Mitchell, Mowery & Davis*, 86 Or. App. 40, 44, 738 P.2d 593, 595 (1987). The landlord, the court explained, is in the best position to know "if there were tenants available to lease the space" and, if there were, why "they were not suitable." *Id.*

The Appellate Court of Illinois assigned the burden of proof to the landlord because the burden to disprove a negative averment should fall on the party that controls the relevant evidence:

> It is well recognized in this State that the burden of producing evidence chiefly, if not entirely, within the control of an adverse party rests upon the same adverse party if he would deny the existence of the facts claimed by another adverse party Additionally, one need not prove a negative averment, the burden of proof being on the party who asserts the affirmative.

Snyder v. Ambrose, 266 Ill. App. 3d 163, 166, 203 Ill. Dec. 319, 320-21, 639 N.E.2d 639, 640-41 (1994) (internal citations omitted). Each of these decisions offers sound reasons to assign the burden on mitigation to the landlord in this context.

In contrast, courts that assign the burden of proof on mitigation to the breaching tenant, generally have not discussed their reasons. *See, e.g., Next Gen Capital*, 234 Ariz. at 12 ¶ 13, 316 P.3d at 601; *Austin Hill Country Realty*, 948 S.W.2d at 299. We, therefore, believe that as time passes, additional states—even some that have so far assigned the burden on mitigation to the tenant—will adopt the view that assigns the burden of proof to the landlord. It behooves us as attorneys, therefore, to advise our landlord clients to make the necessary efforts and to document what they have done, so that they will be able to meet the burden if it is imposed on them.

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Reasonable Efforts

The remaining question then is: what constitutes reasonable efforts in this context? Although the determination of "reasonable efforts" is a totality of circumstances analysis, a number of courts have made such determinations as a matter of law. In *Wilson v. Ruhl*, for example, the Court of Appeals of Maryland held (in the related context of a residential lease) that a landlord satisfied the duty to mitigate by listing the property for re-leasing with "a reputable real estate broker." 277 Md. 607, 612, 356 A.2d 544, 547 (1976), overruled in unrelated part by *Millison v. Clarke*, 287 Md. 420, 436, 413 A.2d 198, 206 (1980). In *Wingate v. Gin*, the Arizona Court of Appeals found, as a matter of law, that the landlord satisfied its duty by listing the property with an agent/realtor, advertising, and contacting potential tenants—despite the fact that the landlord failed "to place a 'for lease' sign on or around the space." 148 Ariz. 289, 291, 714 P.2d 459, 461 (Ct. App. 1985). And, in *MRI Northwest Rentals Investments I, Inc. v. Schnucks-Twenty-Five, Inc.*, the Missouri Court of Appeals held, as a matter of law, that "the mere failure of a landlord to employ a leasing agent to relet the premises does not rise to a failure to mitigate damages." 807 S.W.2d 531, 536 (Mo. Ct. App. 1991).

Other courts have found *failure* to mitigate as a matter of law. In *Pomeranz v. McDonald's Corp.*, for example, the Colorado Court of Appeals held that a landlord failed to make reasonable efforts to relet because it failed to do *any* of the following: (a) list the property with a real-estate agent or a multi-listing directory, (b) advertise in a newspaper or other publication, (c) place a sign on the property, or (d) do anything other than accept calls from parties expressing an interest in the property. 821 P.2d 843, 847 (Colo. Ct. App. 1991), *rev'd in part on unrelated grounds*, 843 P.2d 1378 (Colo. 1993). And in *Vawter v. McKissick*, the Supreme Court of Iowa held, as a matter of law, that the placement of a "for rent" sign (and nothing more) was insufficient evidence of reasonable efforts. 159 N.W.2d 538, 541 (Iowa 1968).

In other instances, the issue could not be decided as a matter of law and was left to a jury to decide. One court did this

where the landlord erected a sign, placed calls to potential tenants, and ran newspaper advertisements as soon as the tenant vacated the premises. *MXL Industries, Inc. v. Mulder*, 623 N.E.2d 369 (Ill. App. 1993). Another court did so where the landlord asked a higher rent for re-leasing than was due under the lease at issue. *Am. Nat'l Bank & Trust Co. v. Hoyne Indus., Inc.*, 738 F. Supp. 297, 302 (N.D. Ill. 1990).

Conclusion

The law of mitigation in the context of lease abandonment is in a state of flux. The modern trend is to require a landlord to mitigate its damages. There may also be a trend—albeit in earlier stages—to assign the burden to the landlord to show that it took reasonable steps to do so. Given this trend, we should advise our landlord clients to make reasonable efforts to release abandoned premises and to keep careful records of those efforts in case it becomes necessary to offer such proof in litigation. And, when representing tenants who are sued for abandoning leased premises, we should conduct discovery as to whether the landlord made such efforts, to determine whether there is a viable failure to mitigate defense.

Table of Jurisdictions

Jurisdiction	Common Law	Modern Trend	Burden	
			Landlord	Tenant
Alabama	X			
Alaska				
Arizona		X		X
Arkansas		X		
California		X		X
Colorado		X		X
Connecticut	X			
Delaware		X		X
Dist. Columbia	X			
Florida	X			
Georgia	X			
Hawaii		X		X
Idaho		X		
Illinois		X	X	
Indiana		X		X
Iowa		X	X	
Kansas		X		
Kentucky	X			
Louisiana				
Maine	X			
Maryland				
Massachusetts		X		
Michigan		X		X
Minnesota	X			
Mississippi				
Missouri	X			
Montana		X		X
Nebraska		X		X
Nevada				
New Hampshire	X			
New Jersey		X	X	
New Mexico	X			
New York	X			
North Carolina		X		X
North Dakota		X		X
Ohio		X		X
Oklahoma	X			
Oregon		X	X	
Pennsylvania	X			
Rhode Island				
South Carolina		X		
South Dakota				
Tennessee		X		
Texas		X		X
Utah		X	X	
Vermont		X		
Virginia	X			
Washington		X		
West Virginia				
Wisconsin		X		
Wyoming		X		X