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IN THE SPOTLIGHT

Imposition of Heightened Duty On Commercial Landlords for Repairs

Recent Deviation from Common Law

By Catherine L. Burns

For decades, the doctrine of *caveat emptor* provided the basis for the common law rule that a landlord has no obligation to make repairs (based upon the reasoning that the tenant leased the premises on an "as-is" basis and assumed all of the risks associated with that "as-is" condition). Over time, jurisdictions gradually modified this common law approach, most notably in the context of residential leasing where jurisdictions have afforded greater protection for residential tenants by imposing an implied warranty of habitability in such leases. Yet, in the context of commercial leasing, many jurisdictions were reluctant to modify the common law rule. In Massachusetts, for example, the Legislature enacted G.L. c. 186 § 15, which provided greater protections to residential tenants. The Supreme Judicial Court of Massachusetts, in continuing the protections for residential tenants, subsequently imposed a duty to exercise reasonable care to remedy defects

continued on page 7

A Landlord's Duty to Mitigate in The District Of Columbia, Maryland and Virginia

By John Kelly

Under common law, a landlord had no duty to accept or procure a new tenant in order to mitigate damages (*i.e.*, take reasonable action to avoid additional injury or loss) resulting from a tenant's breach of a lease, including with respect to an abandonment or refusal to occupy its premises. The rationale for this traditional view arose from the characterization of a lease as a conveyance of a real property interest, and not as a contract. In recent years, many states have enacted statutes applicable to residential landlords that impose a duty to mitigate damages. There is no clear consistency, however, in the law regarding a commercial landlord's duty to mitigate damages. The modem trend, followed in approximately half of the states, is to require commercial landlords to mitigate damages. This modern view characterizes the lease as a contract rather than a conveyance of real estate, and it is an established principle of contract law that parties to an agreement have a duty to mitigate their damages.

Exceptions to Historical Common Law

There are certain exceptions to the historical common law view that a landlord has no duty to mitigate, which in different variations, are currently recognized by some of the "traditional view" states. One exception imposes a duty to mitigate once the landlord re-enters the premises following abandonment by the tenant. There are different standards as to what constitutes re-entry. For example, merely accepting the keys to the premises or keeping the premises in good repair would not typically be considered a re-entry. A second exception imposes a duty to mitigate on a landlord if the lease contains the common "re-entry clause," which permits the re-entry of the premises following abandonment of the premises by the tenant. The District of Columbia, as discussed below, is among the jurisdictions that follow this exception.

Among the states that impose the duty to mitigate on commercial landlords, there is no consensus as to when, or how, that duty is met. Further, there is

continued on page 2

In This Issue

Landlord's Duty

continued from page 1

no consensus among the states as to whether the landlord or the tenant has the burden of proof regarding the landlord's efforts to mitigate damages. Typically, the landlord does not need to re-let the premises in order to satisfy the duty to mitigate. Instead, the landlord must only exercise reasonable diligence by taking steps such as advertising and engaging the services of a broker.

It is important to note that in the states that do not impose a duty on a commercial landlord to mitigate damages following a default by the tenant, the parties can agree to the contrary in the lease. The default law only comes into play absent clear language in the agreement. Even in some states that do impose a duty to mitigate, the landlord and tenant can usually agree to negate such a duty contractually, provided there is no violation of public policy. Commercial landlords and tenants are thus better served by agreeing on the respective rights of each party in the lease document, and it is crucial that the parties negotiating and drafting the lease understand the governing law. The laws of the District of Columbia, Virginia and Maryland relating to the duty to mitigate are more fully discussed below.

District of Columbia

The District of Columbia essentially follows the traditional common law approach. In the District, a landlord has no duty to mitigate its damages after a tenant abandons its premises, provided the lease has no contractual provision reserving the landlord's right to re-enter and re-let while holding the tenant liable for deficiency or loss of rent upon the tenant's default. If, however, the lease contains such a clause, then a landlord in the District has a duty to make reasonable efforts to mitigate damages upon re-entering the premises after abandonment. In a 1971 case, *Simmons v. Federal Bar Bldg. Corp.,* 275 A.2d 545 (D.C.App. 1971), the District of Columbia Court of Appeals held that "it has long been the rule in this jurisdiction that in the absence of a contractual provision reserving the landlord's right to re-enter and re-let upon tenant's default while holding the tenant liable for any deficiency or loss of rent, the landlord is under no obligation to mitigate damages before the expiration of the lease even after an abandonment."

The lease clause permitting the landlord to re-enter and re-let is construed as the landlord's assumption of a duty to use "reasonable efforts" to re-let. A more recent District Columbia Court of Appeals case on the subject, *Hart v. Vermont Investment Limited Partnership*, 667 A.2d 578 (D.C.App 1995), affirms that DC law provides a landlord with three options in the event of a wrongful abandonment in a lease without a re-entry clause. First, the landlord may accept the abandonment, terminate the lease, and terminate the tenant's obligation to pay future rent. The tenant remains liable for any damages specified in the lease as a penalty for its breach. Second, the landlord may re-let the premises and hold the tenant liable for any deficiency in the rent, without acquiescing in the abandonment. The landlord's third option is to allow the premises to remain vacant and to hold the tenant liable for the full rent. *Hart* also affirms the mitigation exception when the lease contains a re-entry clause as discussed above.

Virginia

A commercial landlord generally has no duty to mitigate under the

continued on page 6

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Landlord's Duty

continued from page 2

law of the Commonwealth of Virginia. However, certain older Virginia cases have held that a landlord has a duty to mitigate damages by accepting or procuring a new tenant in the rare situation where a lessee fails to occupy or take possession of the leased premises. These cases have not imposed a duty to mitigate upon the abandonment of premises after a tenant has taken possession. In *James v. Kibler's Admr.*, 94 Va. 165 (1896), the tenant failed to take possession and occupy under the terms of the lease. The court held that the landlord's measure of damages was the difference between what he had received under the violated lease, and what he would have received from the purchaser of the lease at either a private or public sale. The court also remarked that the landlord had a duty to minimize the amount of its damages.

The court in *Crowder v. Virginia Bank of Commerce*, 127 Va. 299 (1920), however, declined to extend the rule from *James v. Kibler's Admr* to cover a tenant who had abandoned leased property after having taken possession. The court distinguished *James* from *Crowder* on the grounds that *James* dealt with a refusal to take possession, rather than an abandonment. The court held that upon a tenant's abandonment before the expiration of the term, a landlord will not be required to relet the premises for the benefit of the tenant, but may, at its election, allow the premises to remain vacant and recover the rent from the tenant for the remainder of the term.

A more recent case, *TenBraak v. Waffle Shops, Inc.*, 542 F2d 919 (4th Cir. 1976) affirmed the older cases listed above. The court noted that the "remedies of a landlord in an action against his tenant are generally recognized, in the absence of express statutory or judicial modification, to be the same as the remedies permitted at common law." The opinion goes on to hold that the law of Virginia allows the landlord certain options when a tenant abandons the premises: The landlord can "re-enter and terminate the lease; it may reenter for the limited purpose of re-letting the premises without terminating the lease, or it may refuse to re-enter and institute an action for accrued rents."

A widely discussed 2007 U.S. District Court case, *Laskin Road Associates, L.P. vs. Capitol Industries, Inc.* (2007 U.S. Dist. Lexis 41276), applied the rule from *Crowder* to find that a commercial landlord had no duty to mitigate damages where a defaulting tenant remained on the premises. The court reasoned that if a commercial landlord had no duty to mitigate with respect to a wrongful abandonment, then clearly there is no duty to mitigate when a defaulting tenant was still in possession of the premises.

Virginia has imposed a duty to mitigate damages by statute for residential leases.

Note, however, that Virginia has imposed a duty to mitigate damages by statute for residential leases.

Maryland

Maryland courts traditionally followed the common law rule that a commercial landlord had no duty to mitigate damages, but recent decisions have modified the rule significantly and even left open the possibility that the traditional view may be in danger. In *Wilson v. Ruhl*, 356 A.2d 544 (Md. 1976), the Court of Appeals set forth a landlord's option when a tenant wrongfully abandons a commercial lease prior to expiration as follows: 1) the landlord may accept the surrender, thereby terminating the tenant's obligation to pay future rent; 2) the landlord may re-enter for the account of the tenant, re-let, and hold the tenant liable for the deficiency; or 3) the landlord may do nothing and hold the tenant liable for the entire amount of rent payable during the remaining term of the lease.

However, in *Circuit City Stores, Inc. v. Rockville Pike Joint Ventures Limited Partnership*, 829 A.2d 976 (Md. 2003), the Court of Appeals moved closer toward the modern rule by applying contract law principles to hold that the landlord must mitigate its damages upon the landlord's termination of a lease because of a tenant default. The *Circuit City* opinion discussed how survival clauses — where a tenant is obligated to pay post-termination rent as damages — rely on contract law rather than real property law for the enforcement of such an obligation. Accordingly, because the right to collect post-termination was a contractual concept, a landlord who terminates a lease or accepts a surrender must accept the contract law doctrine of the duty to mitigate damages. Further, the court did not expressly affirm the landlord's common law right to do nothing, raising the possibility of a future adoption of the modern rule in Maryland. Note that like Virginia, Maryland has also enacted a statute that imposes a duty of mitigation on residential landlords.

Conclusion

Both landlords and tenants need to be aware of applicable state law concerning a landlord's duty to mitigate when negotiating the default provisions of a commercial lease. Further, landlords need to understand the consequences of enforcing certain remedies such as terminating a lease or accepting a surrender after a tenant default. The laws of the states differ significantly and the parties could be exposed to unexpected consequences if they do not draft the remedies provisions with due consideration being given to the applicable law in such jurisdiction on tenants and landlords.

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