

Real Estate Title Insurance & Construction Law

A Landlord's Duty to Mitigate In a Commercial Context

By Melvyn Tarnopol

Unless the lease expressly provides otherwise, a landlord is at risk in a commercial context if the landlord fails to act in a reasonable manner to mitigate damages upon a tenant's default. In a recent unpublished case, *Cheesequake Realty, L.L.C. v. Finkelstein, et al.*, Superior Court of New Jersey, Appellate Division, Docket No. A-1877-08T3, 2010 WL 2991000 (N.J. Super. A.D.) (July 28, 2010), the landlord failed to do this and paid the price. The facts of *Cheesequake* are, in pertinent part, as follows. The tenant vacated its leased premises approximately two years before its lease expired. There was a dispute between the landlord and the tenant as to whether the tenant had the right to vacate the leased premises. In any event, upon the tenant's vacating of the leased premises, the landlord made no effort for the balance of the term of the lease to relet the premises. More specifically, a subtenant at a portion of the premises had received many phone calls from persons expressing interest in leasing the leased premises that the subten-

ant relayed to the landlord. However, the landlord informed the subtenant that the landlord "could not do anything" until the tenant's lease expired, and instructed the subtenant "not to bother telling him about future inquiries." The landlord also admitted at its deposition that it had not tried to get new tenants for the property until the tenant's lease was up. The trial judge granted summary judgment in favor of the tenant (and the Appellate Division, in this case, affirmed) on the ground that the landlord had not presented any evidence that would permit a jury to find that the landlord made any effort to mitigate its damages.

The court held that "a landlord's total failure of effort to mitigate damages by seeking another tenant warrants entry of judgment in favor of the tenant on a landlord's claim for rent due after surrender of the property."

The seminal case on the issue of a landlord's duty to mitigate in a commercial context is *McGuire v. Jersey City*, 125 N.J. 310 (1991). In *McGuire*, the New Jersey Supreme Court noted that in *Sommer v. Kridel*, 74 N.J. 446 (1977), it was held that a residential landlord must mitigate damages arising from the breach of the lease by reasonable attempts to relet the premises.

In *McGuire*, the Court chose to extend a landlord's obligation to mitigate damages in the residential context to a similar obligation to mitigate damages in a commercial context. Thus, the landlord bears the burden of demonstrating actions taken to mitigate damages.

It is interesting to note that in *McGuire*, the Court did not need to reach the question of whether the law requires mitigation of damages in a commercial context, since the lease in question contained an express provision that the landlord was to "take all reasonable steps to relet the leased premises in order to mitigate the damages or loss which may be charged to the lessee." Nonetheless, the Court chose to hold that New Jersey law requires mitigation of damages in a commercial context.

Earlier, in *Fanarjian v. Moskowitz*, 237 N.J. Super. 395 (1989), the Appellate Division, without relying on any specific provision in the lease requiring the landlord to mitigate damages, had elected to extend the landlord's obligation to mitigate damages from the residential context to the commercial context. In *Fanarjian*, the Appellate Division cited public policy considerations consisting of denying the injured party the opportunity to sit idly by and exacerbate damages; discouraging economic and physical waste; and encouraging the vacant property be put to a practical use as soon as possible. However, the Appellate Division in *Fanarjian* stated that it "need not decide in this appeal whether under contract principles the parties to a commercial lease

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can contract away the mitigation of damage requirement” and stated that it would “leave that determination for a case in which the issue is squarely presented.”

Although this question has not subsequently been explicitly been dealt with by New Jersey courts, it is likely that New Jersey courts would hold that a landlord and tenant have the right to negotiate a provision to the effect that the landlord has no duty to mitigate damages in a commercial context. Certainly, this is a common provision in landlords’ forms of commercial leases.

From a landlord’s standpoint, a landlord will want an explicit provision to the effect

that it does not need to mitigate damages.

From a tenant’s standpoint, if confronted with such a provision, the tenant will counter that the landlord be obligated to exert reasonable efforts in mitigation of damages. This dynamic can result in a provision defining and describing exactly what efforts a landlord has to take to be considered to have been reasonable. Among other possible protections, landlords will seek a provision that (a) limits the landlord’s financial obligation to fit out the premises for a new tenant; (b) requires delivery of the premises before the obligation to mitigate commences; (c) permits landlord discretion

as to the type of use for a new tenant and the caliber of the new tenant; (d) permits the landlord to lease vacant space in preference to re-leasing the premises; and (e) permits the landlord to honor any restrictions contained in leases for other space in a development.

If representing a tenant, and if there is no express provision in the lease permitting the landlord not to mitigate damages, it is best for the tenant to remain silent and not raise the issue, since in *McGuire* the New Jersey Supreme Court held that the landlord has a duty to mitigate absent an express provision to the contrary. ■