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A Lessor's Duty to Mitigate Damages

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A LESSOR'S DUTY TO MITIGATE DAMAGES

The recent Wyoming case, *System Terminal Corporation v. Cornelison*,[1] involves a complaint and a counterclaim for damages arising from a breach of a lease. The lessor sued for defendant's failure to yield up the premises in good order, overgrazing, and misuse of the land contrary to the covenants of the lease. The lessee counterclaimed for plainttiff's pasturing the land for several months during the term of the lease. In affirming recoveries on both plaintiff's claim and the counterclaim the court stated:

> Construed reasonably, this evidence tends to show that there was no wrongful taking over of the premises on November 15 since there was an apparent breach of the lease by the lessee and a leaving of the premises without someone in attendance, *which situation required the landlord to make a reasonable effort to mitigate damages which might arise therefrom.*[2]

The decision did not state just what type of damages were being mitigated, but it did find that under the circumstances (including acceptance by the lessor of rent from the lessee after the lessor had been in possession) there was a continuing obligation for the lessee to pay rent, and that the lessee had a claim against the lessor for the lessor's interference with the lessee's possession. It should also be noted that here the lessor had notified the lessee that they must act to minimize their damages and that their doing so must not be construed by the lessee as re-entry of the premises or an acceptance of possession.

The usual rule applying to contracts is that there is always a duty upon the injured party to act in such a manner as to mitigate his damages.[3] The question raised by the *Cornelison* case is whether this general rule is to be extended to covenants to pay rent.

The general rule has been and yet is in most jurisdictions that the lessor has no duty to mitigate damages arising from a breach of the lessee's covenant to pay rent. The usual view is that a lessor has no duty to relet for the benefit of the tenant, and may at his election treat the lessee as the party yet responsible for the rent, even if by doing so he permits the premises to remain vacant.[4]

The theory is that the lessee by the act of abandoning will not be permitted to cast the burden upon the lessor to find someone to take the place of the lessee. The lessor has made his choice and has only one lessee to whom he can look for rent. The courts reason that the lessor

1. System Terminal Corporation v. Cornelison, Wyo., 364 P.2d 91 (1961).
2. Id. at 95.
3. Craig v. Higgins, 31 Wyo. 166, 224 Pac. 668 (1924); Restatement, Contracts § 336 (1932).
4. Enoch Richards Co. v. Libby, 136 Me. 376, 10 A.2d 609 (1940); Crosbie, Inc. v. Fisher et al., 188 Okla. 415, 109 P.2d 1075 (1941); McNally v. Moser, 210 Md. 127, 122 A.2d 555 (1956); Friedman v. Thomas J. Fisher & Co., D.C., 88 A.2d 321 (1952), 31 A.L.R.2d 827.

is allowed to stand upon the terms of the lease, and so long as he complies with the terms of the lease he has the right to look to the tenant for the agreed rent during the life of the lease.[5]

Many jurisdictions have had long standing decisions establishing the rule on rent damages, but where the question has only recently been decided the result has been the same.[6] In the *Gruman* case the court discusses and anlayzes the majority and minority views before holding with the majority that there is no duty to mitigate damages resulting from the failure to pay rent. The court states:

> It would seem clear from the language adopted in all such cases that the lessors therein are entitled to place full reliance upon the the responsibility of their respective lessees for the rentals they have contracted to pay.[7]

However, the Minnesota court also states:

> The cited cases of course are to be distinguished from those wherein a lessor by some act or statement has indicated his acceptance of a lessee's abandonment of leased premises and thus in effect terminated the lease. The remedy there of course is for damages resulting from the breach with the attendant obligations upon the lessor to use reasonable efforts to mitigate such damages subsequent to the breach.

By such an interpretation it is essential to determine whether the lessor's action constitutes an acceptance of the abandonment or other action resulting in a termination of the lease.

There are, however, some jurisdictions and writers adopting the so-called minority rule recognizing a duty upon the lessor to mitigate damages. Professor Powell feels that to require an effort to mitigate would be a preferable rule since it applies to contracts of leasing the business approach applicable generally to other contracts.[9] Kansas[10] and Iowa[11] have expressly recognized the existence of a duty to minimize damages. This duty is to let the property at the best obtainable rent, and thereby obviate or reduce the resulting damages, or at least to make a reasonable effort to secure a new tenant. The *Lawson* case recognizes its holding to be in the minority, but upholds it as the better rule. Wisconsin seems to have approved the same rule.[12] In Illinois there have been many cases, but the

5. Patterson et al. v. Emerick, 21 Ind. App. 614, 52 N.E. 1012 (1899).
6. Gruman v. Investors Diversified Services, 247 Minn. 502, 78 N.W.2d 377 (1956).
7. Id. at 381.
8. Ibid.
9. 2 Powell, Real Property, ¶ 229, note 79.
10. Lawson v. Callaway, 131 Kan. 789, 293 Pac. 503 (1930); Steinman v. John Hall Tailoring Co., 99 Kan. 699, Pac. 452 (1917).
11. Friedman v. Colonial Oil Co., 236 Iowa 165, 18 N.W.2d 196 (1945), where the court cites the Restatement, Contracts § 336, on Avoidable Harm. Other Iowa cases developing the rule: Becker v. Rute, 228 Iowa 533, 293 N.W. 18 (1940); Benson v. Iowa Bake-Rite Co., 207 Iowa 410, 221 N.W. 464 (1928); Roberts v. Watson, 196 Iowa 816, 195 N.W. 211 (1923).
12. Anderson v. Andy Darling Pontiac, 257 Wis. 371, 43 N.W.2d 362 (1950).

law in this area is not yet settled. However, a recent case,[13] while not going as far as the Kansas, Iowa and Wisconsin cases, does take a definite step toward requiring mitigation.

In the *Cornelison* case the lessee had notice that the lessor's action was not to be construed as a re-entry of the premises or an acceptance of possession. The court states that there was an apparent breach of the lease by the lessee and this with the fact that no one was left in charge created the situation which required the lessor to mitigate damages. However, the language is not specific enough to say, without doubt, if the requirement to mitigate refers to only the usual covenants requiring mitigation or all covenants in the lease.

In support of the statement here in question the court cites two cases and a section in C.J.S.[14] The *Weinsklar* case, a suit to recover rent, expresses the Wisconsin view as giving the lessee an option.

> Where a tenant vacates or abandons the leased premises before the end of the term, the landlord has the right to elect to accept the surrender and terminate the lease or to enter and take possession for the purpose of mitigating the damages for which the tenant is liable because of his breach of the lease.[15]

In the *Burkhalter* case the lessee after paying rent for several years abandoned the property and refused to pay rent. The lessor relet the property but could do so only at a lesser rental than the defendant had agreed to pay. In the suit for damages resulting from defendant's breach of the renting contract the court stated, "It was their duty to minimize their damages as far as they could reasonably do so."[16]

The section in C.J.S cited by the Wyoming court states, "Ordinarily, the landlord is in duty bound to make a reasonable effort to mitigate the damages arising from the breach, . . ."[17] In support of this statement three cases are cited, the two discussed above and an Arkansas case.[18] There the lessee abandoned the lease and the lessor sued for damages resulting from the breach of the contract. The court found that the lessor did not accept the surrender of the lease, and approved a jury instruction requiring the lessor, after learning that the lessee had violated the contract, to use all reasonable efforts to minimize the damages, saying "and

13. Wohl v. Yelen, 22 Ill. App.2d 455, 161 N.E.2d 339 (1959), where the court holds that although the landlord need not seek out new tenants, he must mitigate damages by accepting a subtenant tendered to him. At p. 343 the court states, "virtually all the cases refusing to accept the rule of mitigation involve landlords who have not re-entered and have not been presented with acceptable tenants by the defaulting tenant."
14. Weinsklar Realty Co. v. Dooley, 200 Wis. 412, 228 N.W. 515, 67 A.L.R. 875 (1930); Burkhalter v. Townsend, 139 S.C. 324, 138 S.E. 34 (1927); 51 C.J.S. Landlord and Tenant, § 250, p. 888.
15. Weinsklar Realty Co. v. Dooley, 200 Wis. 314, 228 N.W. 515, 517 (1930).
16. Burkhalter v. Townsend, 139 S.C. 324, 138 S.E. 34, 37 (1927).
17. 51 C.J.S., Landlord and Tenant, § 250, p. 888.
18. LaVasque v. Beeson, 164 Ark. 95, 261 S.W. 49 (1924).

if they failed to do so, the jury would take that into consideration in asssessing the amount of damages sustained by the appellees."[19]

Thus it is seen that although the *Cornelison* case was a suit for breach of covenants other than to pay rent, the court in support of its statement cites cases wherein the covenant to pay rent was in question. It would seem that when the court states, ". . . which situation required the landlord to make a reasonable effort to mitigate damages which might arise therefrom," the reasonable interpretation would be that the Wyoming Supreme Court is not holding with the majority, but is in fact adopting the rule that there is a duty upon the lessor to act to mitigate damages resulting from the breach of all covenants, including the covenant to pay rent.

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19. Id. at 52.