

MITIGATING THE LANDLORD'S DAMAGES FOR A BREACHED LEASE HE TRIED, BUT CAN HE PROVE IT?

By Jim Hochman & David Liebman, SIOR

We have all heard the maxim that when a tenant breaches a lease, perhaps by abandoning the space, or failing to pay rent and getting evicted, the landlord must mitigate its damages. What, exactly, does this mean?

In the landlord/tenant body of law, the duty to mitigate damages has been defined as:

“A duty on the injured party to exercise reasonable diligence and ordinary care in allegations to minimize his damages...” *Amalgamated Bank of Chicago v. Kalman and Associates, Inc.*, 318 Ill App. 3d 648, at 658 (1st Dist. 2000).

This duty – or the injured party's failure to mitigate damages – can impact the amount of damages recovered.

Let's take the following set of facts. Landlord and tenant sign a 10-year lease, Tenant pays rent for seven years, but Tenant's business slows and then vacates the premises. Landlord wants to recover three years' of lost rent, but when Landlord files suit, will a judge award Landlord the full amount of lost rent? Not likely. Will a court perhaps award Landlord the three years' lost rent discounted for present value? Still not likely. Landlord needs to prove that he did his best to:

1. Clean up the space;
2. List it for lease; and

3. Have his broker conduct commercially reasonable efforts to find a replacement tenant for all, or even some, of the rent that should have been paid by that first tenant.

You won the listing, and you know how to list property and market space for lease, but are there other things you should do in these circumstances? Of course there are, and you need to document and prove what you have done or will be doing. Here are some suggestions:

1. Take plenty of photographs of the space as close to the date the first tenant vacated the premises as possible.
2. Help Landlord get at least three estimates for and bids to restore the space to a condition that makes it showable, if not immediately leasable.
 - a. Remove all debris.
 - b. Remove trade fixtures, old carpet, interior fencing, unless fixtures (e.g. racking) could be used by the next Tenant.
 - c. Repair damaged flooring, patch holes, and concrete.

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d. Make the parking area useable, i.e. fill potholes, and replace broken concrete parking bumpers.

e. Repair all docks and doors.

3. Keep perfect records of all bids, improvement contracts, and payment of all repair costs.

4. Now – prepare a proper brochure with pictures of the cleaned-up space.

5. Document all your marketing efforts:

a. List with information services (Co-Star, LoopNet, MLS, etc.).

b. Conduct open houses.

c. Present your listing at your company sales meeting (to your colleagues) and at industry events (to your competitors).

d. Make sure your asking rent is reasonable within the market. Asking too much rent could expose Landlord to criticism from that first Tenant's defense attorney.

e. Prepare frequent marketing reports to your client, keeping that Landlord (and eventually the court) abreast of all your efforts.

6. Encourage your Landlord client to make a deal, even if the rent is lower than he would have received from that first Tenant, as it will show efforts to minimize what he needs from the first Tenant to be made whole.

7. Document every offer, every LOI, every step in the re-leasing process, as it will help your testimony in court and you will be a more credible witness if you are testifying from contemporaneous records.

All of this might be considered going beyond what is commercially reasonable, but remember that your Landlord has to prove his efforts to mitigate damages to the judge, perhaps even to a jury. You should earn your client's gratitude for your efforts – reward in itself, but it might just get you the next good listing assignment. ♥