Damages

Second Department Finds No Duty to Mitigate

BY WARREN A. ESTIS AND WILLIAM J. ROBBINS

A recent decision by the Appellate Division, Second Department in *Rios v. Carrillo*[1] expressly held that "a residential landlord is under no duty to mitigate damages where the terms of the lease do not indicate otherwise." The Appellate Division decision was written by Justice Robert A. Lifson, with all the other judges on the panel, i.e., Presiding Justice A. Gail Prudenti, Justice William F. Mastro and Justice Fred T. Santucci, concurring. We discuss here the court's reasoning and the case authority upon which it relied.

Given the 1995 Court of Appeals decision *in Holy Properties Ltd., LP v. Kenneth Cole Productions Inc.*,[2] the law is clear that in a commercial lease, the landlord has no duty to mitigate damages where the tenant has abandoned the premises. This means that a commercial landlord can refuse to re-rent the premises and can sit idly by while damages pile up on the tenant during the remainder of the lease.

In the *Holy Properties* case, involving a tenant in a commercial office building that vacated the premises three years before the end of a ten-year lease term, the Court of Appeals held that:

> Once the tenant abandoned the premises prior to the expiration of the lease, ...the landlord was within its right under New York law to do nothing and collect the full rent due under the lease.[3]

Generally, under contract law, when there has been a breach of contract, there is a duty to mitigate damages. In *Holy Properties*, the Court of Appeals explained why that contract rule was not applicable in the landlord/tenant context, stating:

> The law imposes upon a party subjected to injury from breach of contract, the duty of making reasonable exertions to minimize the injury.... Leases are not subject to this general rule, however, for, unlike executory contracts, leases 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.[4]

Recognizing leases as a present transfer of an estate in real property, i.e., the conceptual basis of the no mitigation rule, goes back to feudal times. According to English common law, a lease (whether for commercial or residential property) was deemed to be a contract of sale of a vested interest in real estate. Rent was deemed to be the purchase price, to be paid in regular installments. Once the tenant "bought" the property, he was obligated to pay the full purchase price, even if he no longer intended to use the premises.

In short, as to commercial leases, the law is clear that there is no duty to mitigate, based on a conceptual approach to leases that goes back to feudal times. The issue of whether there is a duty to mitigate where a residential lease is involved, however, had appeared uncertain.[5]

Carrillo has now removed that uncertainty, in the Second Department in any event. In that case, on or about July 29, 2000, the landlord leased a residential apartment to the tenant for a two-year term. Around October 2001, the tenant vacated the apartment and ceased paying rent of $3,500 per month. The tenant asserted that he did so with the landlord's consent. Challenging that contention, in 2003, the landlord commenced a lawsuit to recover damages consisting of the unpaid rent she claimed due pursuant to the parties' lease. The apartment had not been re-rented to any other tenant during the lease term.

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The Supreme Court, Queens County dismissed the complaint, determining that the landlord had failed to prove that she made a serious attempt to mitigate damages. According to the decision of Judicial Hearing Officer Sidney Leviss, before whom a non-jury trial was held upon the parties' stipulation, the "only testimony offered was that she [the landlord] listed the apartment with a broker and was not offered $3,500.00 per month."[6]

Citing an Appellate Term, Second Department, decision in *Paragon Industries Inc. v. Williams*,[7] and a Civil Court, Kings County decision in *Palumbo v. Donalds*,[8] JHO Leviss held that "in this judicial district, a landlord has a duty to mitigate damages by reletting the premises" when the tenant leaves before the end of the term, and the landlord must make reasonable and diligent efforts to re-rent the premises.

The Appellate Division, Second Department, reversed and reinstated the complaint. The appellate court stated that the Supreme Court had "improperly determined that the plaintiff owed the defendant a duty to mitigate damages upon the breach of the parties' residential lease" and that its reliance on *Paragon* and its progeny was "misplaced." Citing *Holy Properties*, and quoting the passage from that case set forth above to the effect that leases are not subject to the general rule of mitigating damages, the Appellate Division pointed out that "[w]ell-settled law in this State imposes no duty on a residential landlord to mitigate damages." The court expressly recognized that *Holy Properties* involved a commercial lease, but commented that:

> ...[T]he broad language employed and the reliance on real property principles negates the possibility that the Court of Appeals [in *Holy Properties*] was confining its determination only to commercial leases. There is simply no basis for limiting the broad language of [that Court of Appeals case].[9]

In support of its characterization of the no-mitigation rule as the well-settled law in New York, the *Carrillo* court also cited the decision of the Appellate Term, First Department in *Whitehouse Estates Inc. v. Post*.[10] There, in a residential case, the court had stated as follows:

> While a commercial tenancy was the subject of the litigation in *Holy Properties*, neither the language nor reasoning employed in the decision signals an intent on the part of the Court of Appeals to abrogate the no-mitigation rule in the context of residential landlord and tenant relationships.... Accordingly, we follow and apply the settled higher authority which relieves a landlord of any obligation to mitigate damages where the tenant has abandoned the premises prior to the expiration of the lease term.[11]

'Carrillo' unequivocally stands for the applicability of the no-mitigation rule in a residential context. That is a rule that some might consider to be harsh to residential tenants because of the significant damages to which it exposes them.

The Appellate Division in *Carrillo* also emphasized that in *Holy Properties* the Court of Appeals had "placed great weight on the fact that the parties' lease 'expressly provided that plaintiff was under no duty to mitigate damages and that upon defendant's abandonment of the premises or eviction, it would remain liable for all monetary obligations arising under the lease.'" It quoted the Court of Appeals' statement in *Holy Properties* that "[i]f the lease provides that the tenant shall be liable for rent after eviction, the provision is enforceable."

That was significant to the Appellate Division in *Carrillo* because, as it pointed out:

> Similarly, in the matter now before us, the lease between the parties provided that the defendant remains liable for the rent upon the cancellation of the lease except as provided by law. Thus, the

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parties agreed at the onset of the tenancy that the defendant would remain liable for rent due under the lease for its duration.[12]

Another point which the Appellate Division, Second Department, made in *Carrillo* was that the view expressed in *Paragon* that there is a duty to mitigate by a residential landlord "has not been uniformly applied" even within the Appellate Term, Second Department. As an example of a contra-*Paragon* holding, the court cited the decision of the Appellate Term, Second and Eleventh Judicial Districts in *Callender v. Titus*.[13] There, in a case involving an apartment in a multiple dwelling, the appellate court unanimously affirmed an order in which the Civil Court, Kings County (Peter P. Sweeney, J.) had cited *Holy Properties* and *Whitehouse* and stated that the no-mitigation rule "applies to residential tenancies as well as to commercial tenancies."

The Appellate Division, Second Department in *Carrillo* also noted that "[o]ther courts in this Department have likewise opted to not impose such a duty [to mitigate] on a prevailing landlord." It specifically cited the Supreme Court, Westchester County decision in *Duda v. Thompson*.[14] There, in a case involving the leasing of a house, Justice W. Denis Donovan ruled that "the Court is...compelled to apply *Holy Properties* as it more plainly reads, without distinction as to the lack of mitigation obligation based on the character of the lease itself [as residential or commercial]."

Based on the reasoning summarized above, the Appellate Division, Second Department held in *Carrillo* as follows:

> Since the Court of Appeals has not modified its rule in *Holy Props.*, nor has there been any legislative enactment which requires a contrary result, we are constrained to follow what we perceive to be established precedent that a residential landlord is under no duty to mitigate damages where the terms of the lease do not indicate otherwise.[15]

Another disputed issue in the *Carrillo* case was whether the landlord had accepted the defendant's surrender of the premises. The appellate court noted that the Supreme Court never reached this issue "because once it determined that the plaintiff had a duty to mitigate damages, the complaint was dismissed." The Appellate Division remitted the matter to the Supreme Court "to make findings of fact as to whether the plaintiff accepted the surrender and to enter judgment accordingly."

The significance of this issue becomes apparent from one of the cases cited by the *Carrillo* court, *Deer Hills Hardware Inc. v. Conlin Realty Corp.*[16] There, the Appellate Division, Second Department had noted that the "Supreme Court properly determined that the lease between the plaintiff tenant and the defendant landlord was surrendered by operation of law." As stated by the Court of Appeals in *Riverside Research Institute v. KMGA Inc.*,[17] another case cited by the *Carrillo* court, "[a] surrender by operation of law occurs when the parties to a lease both do some act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem the lease terminated."

In *Deer Hills Hardware*, the appellate court concluded that the tenant had abandoned the premises during the lease term and the landlord's conduct "indicated its intent to terminate the lease and use the premises for its own benefit." It continued:

> The Supreme Court properly concluded that the defendant [landlord] accepted the plaintiff's [tenant's] surrender of the premises, and the plaintiff is released from further liability for rent.[18]

In other words, depending on how the Supreme Court were to rule in *Carrillo* on remand on the issue of whether the landlord accepted the surrender, the landlord, notwithstanding the no-mitigation rule, still might not be entitled to recover the damages for which she sued.

The following are additional points to consider in reviewing the reasoning of the Appellate Division in *Carrillo*:

The appellate court in *Carrillo* stated that it was "constrained" to follow the no-mitigation rule because the Court of Appeals "has not modified its rule in *Holy Props.*" and there has not been "any legislative enactment which requires a contrary result." Is it reading too much into that language to conclude that the court is inviting such modification by the state's highest court or such legislative enactment that would require a mitigation rule where a residential lease is involved?

Carrillo unequivocally stands for the applicability of the no-mitigation rule in a residential context. That is a rule that some might consider to be harsh to residential tenants because of the significant damages to which it exposes them. Significantly, as noted above, the *Carrillo* decision itself did not assess damages against the tenant. Instead, it remitted the matter to Supreme Court for a determination on the issue of surrender by operation of law that potentially could release the tenant from liability for unpaid rent. The decision enunciated a doctrine that would have severe consequences for residential tenants, but, given the procedural posture of the case, the Appellate Division did not have to impose any such consequences on the particular tenant involved in the case.

1. NYLJ, July 10, 2008, p. 26, col. 1 (2nd Dep't).
2. 87 N.Y.2d 130, 637 N.Y.S.2d 964 (1995).
3. 87 N.Y.2d at 134, 637 N.Y.S.2d at 966.
4. 87 N.Y.2d at 134, 637 N.Y.S.2d at 966.
5. See, e.g., Warren A. Estis and William J. Robbins, "Mitigation of Damages: What Is the Story? Two Decisions Leave Questions," NYLJ, Dec. 1, 2004, at 5 ("The issue of whether there is a duty to mitigate where a residential lease is involved, however, is more clouded.").
6. 2006 WL 5866003.
7. 122 Misc.2d 628, 473 N.Y.S.2d 92 (A.T. 2nd Dep't 1983).
8. 194 Misc.2d 675, 754 N.Y.S.2d 856 (Civ. Ct. Kings Co. 2003).
9. NYLJ, July 10, 2008, p. 26 at col. 4.
10. 173 Misc.2d 558, 662 N.Y.S.2d 982 (A.T. 1st Dep't 1997).
11. 173 Misc.2d at 559, 662 N.Y.S.2d at 982.
12. NYLJ, July 10, 2008, p. 26 at col. 5.
13. 4 Misc.3d 126(A), 791 N.Y.S.2d 868 (A.T., 2nd and 11th Judicial Districts 2004).
14. 169 Misc.2d 649, 647 N.Y.S.2d 401 (Sup. Ct. Westchester Co. 1996).
15. NYLJ, July 10, 2008, p. 26 at col. 5.
16. 292 A.D.2d 565, 739 N.Y.S.2d 597 (2nd Dep't 2002).
17. 68 N.Y.2d 689, 506 N.Y.S.2d 302 (1986).
18. 292 A.D.2d at 565-566, 739 N.Y.S.2d at 597.