Mitigation of Damages

What Is the Story? Two Decisions Leave Questions

Approximately three years ago, we last wrote in this column on the issue of whether a landlord has a duty to mitigate damages where a tenant has abandoned the premises and the court finds there was no legal justification for doing so.[1] Two decisions in 2004, one by Justice Paul A. Victor of the Supreme Court, Bronx County, in *29 Holding Corp. v. Diaz*[2] and one by the Appellate Term, Second Department, Second and Eleventh judicial districts, in *Callender v. Titus*,[3] show that the issue of mitigation of damages in a landlord/tenant context remains an area where questions abound. (The Appellate Term panel was Justices Michael L. Pesce, Gloria Cohen Aronin and Michelle Weston Patterson.)

Given the 1995 Court of Appeals decision in *Holy Properties Ltd. v. Kenneth Cole Productions Inc.*,[4] 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 10-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.[5]

LANDLORD-TENANT

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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.[6]

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.[7]

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, is more clouded, as the recent decisions in *29 Holding Corp.* and *Callender* reflect.

'29 Holding Corp.'

In *29 Holding Corp.*, the landlord brought an action against a residential tenant and the guarantor of the tenant to recover rent owed by the tenant. Among the defenses raised by the guarantor was the landlord's failure to mitigate damages. The landlord moved for summary judgment against the guarantor.

The court held that all the defenses raised by the defendant in opposition to the motion for summary judgment were without merit, except for the issue of mitigation of damages. The court granted the landlord's motion, directed a trial on the issue of liability and stated that "at the inquest on damages, the landlord should be prepared to demonstrate reasonable and diligent efforts to re-rent the premises."

The court's decision includes an extensive discussion of the relevant case law on mitigation of damages, introduced by the comment that "[t]he issue is one which appears to have generated considerable confusion and somewhat inconsistent determinations." The first case mentioned in that discussion, described by the *29 Holding Corp.* court as the "seminal case in this area", is *Becar v. Flues*,[8] an 1876 Court of Appeals decision. It involved a residential lease, where the tenant died before the lease term was to begin and the tenant's executor returned the keys and sought to rescind the lease. The Court of Appeals held that there was liability for the full amount of the rent, not subject to mitigation based on an offer the landlord had refused from another prospective tenant for slightly less than the agreed rent.

Justice Victor, in *29 Holding Corp.*, then referred to various cases which rejected the *Becar* rule and held that a residential landlord had a duty to mitigate its damages. There was a 1974 Civil Court decision in *Parkwood Realty Co. v. Marcano*,[9] where then Judge Bentley Kassal (later a justice of the Appellate Division, First Department) held that a residential landlord had a duty to mitigate its damages, stating that "there is no longer good reason — if there ever was — why leases should be governed by rules different from those applying to contracts in general."

Continuing the case law chronology, the court in *29 Holding Corp.* commented that:

> This "progressive" trend which recognized a duty to mitigate in a residential context gained momentum until it appeared to gain acceptance as the prevailing rule.[10]

In support of that comment, the court cited the 1987 Appellate Term, Second Department, decision in *Paragon Industries, Inc. v. Williams*,[11] where the court expressly held that a residential landlord has a duty to mitigate damages. The court also referred to the 1987 Appellate Division, First Department, decision in *Syndicate Building Corp. v. Lorber*.[12] There, in dicta in a commercial case in which the court found that the landlord had no duty to mitigate, the court, citing *Paragon*, commented that "courts in this State have recently imposed a duty to mitigate damages upon residential landlords."

Justice Victor viewed this "modernizing trend" as having been "thrown into a sudden tailspin in 1995" by the Court of Appeals decision in *Holy Properties*, which, "although dealing with a lease to commercial premises, cited the *Becar* case with approval." The court in *29 Holding Corp.* then quoted extensively from two post-*Holy Properties* cases, a decision of the Supreme Court, Westchester County, in *Duda v. Thompson*[13] and a decision of the Appellate Term, First Department, in *Whitehouse Estates Inc. v. Post*.[14]

It described these cases as "conclud[ing] that *Holy Properties* represented a complete adherence to the rule of *Becar*, and consequently, a residential lessor had no duty to mitigate," and quoted the following holding from *Whitehouse*:

> 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.[15]

The court in *29 Holding Corp.* was apparently troubled by how the case law on mitigation of damages has evolved. At the outset of its decision, seemingly referring to the *Whitehouse* and *Becar* cases, respectively, the court in *29 Holding Corp.* stated the issue presented to it as follows:

> Does this Court have the authority to depart from First Department Appellate Term precedent which, based on an antiquated Court of Appeals case, holds

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that residential landlords have no duty to mitigate damages?[16]

The court stated that it was not bound by Appellate Term precedent and, in any event, it "decline[d] to follow the holding in *Whitehouse*." Whereas the Appellate Term, First Department, precedent of *Whitehouse* held there was no duty to mitigate in a residential context, the court in *29 Holding Corp.* found such a duty.

In doing so, the court in *29 Holding Corp.* rejected "the proposition that *Holy Properties* governs in the residential landlord-tenant context" and commented that:

> The concept that a landlord can hold a residential tenant hostage to the terms of a lease, doing nothing and permitting damages to accrue when leased premises are readily marketable is clearly contrary to common sense, the reasonable expectations of the public, and notions of justice and equity.[17]

At other points, it referred to the no-mitigation rule as "unconscionable, and violative of public policy" and as "an antiquated rule of law which would encourage the warehousing of residential apartments, frustrate the mobility of the population, and result in an inequitable and intolerable burden on residential tenants."

Commercial and Residential

Undoubtedly because the law is so clear that in a commercial context there is no duty to mitigate, the court in *29 Holding Corp.* sought to differentiate the commercial context from the residential context, stating:

> It is almost axiomatic that commercial leases may and should be governed by a different rule than residential leases. A commercial tenant which has negotiated a lease which provides that the landlord need not mitigate damages may take proper precautions against the possibility of default, may seek to assign or sublet, or may simply defer abandoning the lease. The same cannot be said of the average citizen in a mobile society, who may choose to or be required to re-locate for a myriad of health-related or other personal reasons.[18]

The court in *29 Holding Corp.* viewed the Second Department as supporting its conclusion of a duty to mitigate in the residential context. Citing *Palumbo v. Donalds,*[19] a 2003 Civil Court, Kings County, case, it stated:

> [O]ther courts (especially the lower courts in the Second Department) appear to adhere to the distinction in treatment between residential and commercial cases, which existed prior to the decision in *Holy Properties*. These cases hold that there exists a duty to mitigate in the context of residential leases, but not with respect to commercial leases.[20]

The court in *29 Holding Corp.* commented that "[t]his analysis [by Second Department lower courts] is supported by the expedient of citing only pre-*Holy Properties* cases."

'Callender v. Titus'

There is now, however, Appellate Term precedent in the Second Department, post-dating both *Palumbo* and *29 Holding Corp.*, that clearly finds the no-mitigation rule applicable in the residential context. That precedent is the decision of the Appellate Term, Second and Eleventh judicial districts, in *Callender v. Titus*, issued a little more that two months after the *29 Holding Corp.* decision. 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." Accordingly, even though the Civil Court was "of the opinion that the plaintiff could have mitigated his damages by re-renting defendant's apartment much earlier than he did," the Civil Court held the landlord entitled to the full amount of unpaid rent sought.

Is it appropriate to apply a rule grounded in feudal times and divergent from the general contract law of damages?

The Appellate Term in *Callender* held that "[t]he court's damages determination in favor of plaintiff was also proper, as plaintiff, the landlord, had no duty to mitigate his damages by reletting the premises." Among the cases it cited in support of that no-mitigation rule were *Holy Properties* and *Commuter Housing Company v. Saunders.*[21] That latter case was a 2000 decision by the Appellate Term, Ninth and Tenth judicial districts, which, relying on *Holy Properties*, *Whitehouse* and *Duda*, held, in a residential context, that a landlord had no duty to mitigate damages.

Following are points to consider with regard to the issue of mitigation of damages in a residential context:

Given the conclusion of the court in *29 Holding Corp.* that there is a duty to mitigate in the residential context, while clearly *Holy Properties* held that there is no such duty in the commercial context, it is logical that the *29 Holding Corp.* court emphasized distinctions it considered to exist between the commercial and residential contexts.

Need for Uniformity

There may be disagreement as to whether cogent reasons have been advanced for different treatment between the residential and commercial contexts with respect to the issue of mitigation of damages. For those who are of the view that no convincing justification for different treatment exists, it seems the conclusion is compelled that a uniform rule should apply in both contexts. Since the Court of Appeals in *Holy Properties* has been so definitive that there is no duty to mitigate with respect to a commercial lease, that would mean a no-mitigation rule also for residential leases. Perhaps the real question should be whether it is appropriate, in the twenty-first century, to apply a rule grounded in feudal times and divergent from the general contract law of damages.

1. Warren A. Estis and William J. Robbins, "Mitigating Damages: Landlord's Duty May Depend on Where You Live," N.Y.L.J., Dec. 5, 2001, at 5. Before that, the topic was addressed in this column in Estis and Robbins "Commercial Leases: Court Affirms Landlord Has No Duty to Mitigate Damages," N.Y.L.J., Feb, 7, 1996, at 5, and Estis, "Feudalism Is Alive and Well: The 'No Duty to Mitigate Rule' for Commercial Landlords," N.Y.L.J., Oct. 6, 1993, at 5.
2. 3 Misc. 3d 808, 775 N.Y.S.2d 807 (Sup. Ct. Bronx Co. 2004).
3. 4 Misc. 3d 125(A), 2004 WL 1433642 (A.T. 2d & 11th judicial districts 2004).
4. 87 N.Y.2d 130, 637 N.Y.S.2d 964 (1995).
5. 87 N.Y.2d at 134, 637 N.Y.S.2d at 966.
6. 87 N.Y.2d at 133, 637 N.Y.S.2d at 966.
7. See, e.g., Rasch, N.Y. Landlord & Tenant, §26:22 (3rd ed. 1988).
8. 64 N.Y. 518 (1876).
9. 77 Misc. 2d 690, 353 N.Y.S.2d 623 (Civ. Ct. Queens Co. 1974).
10. 3 Misc.3d at 812, 775 N.Y.S.2d at 810.
11. 122 Misc. 2d 628, 473 N.Y.S.2d 92 (A.T. 2d Dep't 1983).
12. 128 A.D.2d 381, 512 N.Y.S.2d 674 (1st Dep't 1987).
13. 169 Misc.2d 649, 647 N.Y.S.2d 401 (Sup. Ct. Westchester Co. 1996).
14. 173 Misc. 2d 558, 662 N.Y.S.2d 982 (A.T. 1st Dep't 1997).
15. 3 Misc. 3d at 815-816, 775 N.Y.S.2d at 812, quoting 173 Misc.2d at 558, 662 N.Y.S.2d at 982.
16. 3 Misc. 3d at 809, 775 N.Y.S.2d at 808.
17. 3 Misc. 3d at 817, 775 N.Y.S.2d at 813.
18. 3 Misc. 3d at 817, 775 N.Y.S.2d at 814.
19. 194 Misc.2d 675, 754 N.Y.S.2d 856 (Civ. Ct. Kings Co. 2003).
20. 3 Misc. 3d at 816, 775 N.Y.S.2d at 813.
21. N.Y.L.J., Dec. 11, 2000, p. 35, col. 3, 28 HCR 762C (A.T. 9th & 10th judicial districts).