

THE MITIGATION DEFENSE IN A BREACH OF LEASE ACTION

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Last year, Joe, the proprietor of Joe's Donut Shop, wasn't paying his rent, but promised to do so if you would just reduce his rent by 50 percent. You, the landlord, said "no", and evicted Joe. Now you are pursuing damages against Joe for the last 12 months of rent, and Joe defends your action by saying you didn't "mitigate your damages". Joe says you should only get half of your delinquent rents because he offered to stay and pay 50 percent. If only you had left Joe in place paying half of his rent, you'd be 50 percent better off today. Who wins this one, landlord or tenant?

In the past several years, Joe's allegation that the landlord failed to mitigate has become the defense of choice for tenants and their attorneys in defending an action for tenant's breach of a lease. We all have heard the argument that *had* the landlord merely reduced the rent, the tenant would have been able to operate its business and would not have abandoned the premises. The question that has been asked is: "Does the landlord's failure to reduce a tenant's rent during the tenancy establish a defense of failure to mitigate when the landlord files a breach of lease action?" The answer is resoundingly - "No."

For context, a preliminary understanding of the mitigation defense is appropriate. The Civil Code provides that a landlord is entitled to an award of the amount of unpaid rent for the balance of the lease term that "exceeds the amount of such rental loss that the lessee proves could be reasonably avoided; ..." Thus, when the landlord's damages include future rent, the statute shifts the burden of proof to the tenant to prove that the amount of future rent claimed could have been "reasonably" avoided in some manner. The statute requires the tenant to produce "evidence", not merely the tenant's opinion, that the steps taken by the landlord to re-lease the premises were not reasonable. Generally, the evidence will consist of the opinion testimony of a real estate expert regarding market conditions at the time of the mitigation efforts.

While the analysis of reasonable mitigation efforts is performed in hindsight, courts have held

that the landlord will not be denied recovery for its damages because, while acting reasonably to avoid damages, it did not use the *optimal* means of mitigation. Moreover, the fact that the landlord could have undertaken alternative means of mitigation is not proof that the steps actually taken by the landlord were unreasonable. The court has said that its focus is “not on the failure of the plaintiff [landlord] to pursue ... alternative courses of action suggested by defendant [tenant] but upon the reasonableness of the action which plaintiff [landlord] did in fact take.” In the recent economic decline, former tenants and their attorneys have argued that the mitigation defense required the landlord to mitigate its loss of future rent by renegotiating the lease and reducing the rental rate for the breaching tenant. However, that argument is at complete odds with contract law and has been struck down by a California court.

In that case, the landlord obtained an unlawful detainer judgment against its tenant which terminated the lease and evicted the tenant from the premises, like Joe’s Donut Shop. The landlord then sued to recover damages, including future rent. In arguing that the landlord failed to mitigate its damages, the tenant presented evidence that it offered to re-lease the premises after the eviction, *albeit* at a lower rental rate. It argued that the landlord’s failure to re-lease the property to the tenant was unreasonable and a failure to mitigate damages. The court disagreed and held that “it was not necessary for a plaintiff landlord to renegotiate another lease with a defendant tenant who has repudiated its original lease and whose lease was terminated by an unlawful detainer judgment even though the tenant offers terms that conceivably could result in avoiding loss. ...” Such a requirement to avoid a defense of failure to mitigate was legally unacceptable.

The law is clear, a landlord’s obligation to mitigate its future damages only comes into play after possession of the premises is returned to the landlord, either through an eviction or abandonment. Even, then, the law only requires the landlord to take “reasonable” steps, and not optimal steps, to mitigate its damages and locate a replacement tenant. Finally, the mitigation defense, in no way, requires the landlord to renegotiate the lease with a breaching tenant. So, Joe, although being creative will not be able to use his earlier offer to pay less rent, as a means of mitigating the landlord’s damages for his breaches.