

TENANTS WHO LEAVE EARLY: DO NOT ASSUME YOU CAN AVOID THE RENT

By Steven Troup



In situations where a tenant leaves leased premises before the expiration of the lease term, until recently, different results were sometimes obtained in cases involving commercial tenants versus cases involving residential tenants. In a 1995 case, *Holy Properties v. Kenneth Cole*, New York's highest state court ruled that a landlord

does not have a duty to mitigate damages when a commercial tenant abandons leased premises before the end of the lease term. Under *Holy Properties*, if a commercial tenant abandons its premises prior to the end of the lease term, a landlord may do nothing and collect the full amount of rent due under the lease for the remaining term from the departed tenant as damages. The landlord does not have to seek another commercial tenant to fill the unexpired term of the lease.

More recently, an intermediate New York state appellate court ruled, in *Rios v. Carrillo*, that a landlord does not have a duty to mitigate damages caused by a residential tenant who abandons leased premises early. This ruling extends to residential leases the holding in *Holy Properties* regarding commercial leases. *Holy Properties* and *Rios* both represent departures from the usual rule that prevails in most types of breach of contract cases, as opposed to lease cases, where the injured party has an affirmative duty to mitigate its damages.

In light of the decisions in *Holy Properties* and *Rios*, all tenants and landlords should be alert to the issue of whether a landlord will be responsible for trying to find a new tenant for the premises if the tenant leaves before the lease expires. In the absence of a contrary provision in the lease, the landlord will not have an affirmative obligation to seek out a new tenant – or even to accept a new tenant found by the tenant – to mitigate the damages caused by the old tenant's decision to leave early. In other words, unless a lease expressly imposes that duty on a landlord, a tenant who leaves rental space early will remain liable to the landlord for all rental payments due under the lease.

A tenant should always try to negotiate a lease provision that obligates the landlord to attempt to re-let the premises if the tenant vacates before the expiration of the lease and therefore cancels the lease. If the new lease provides for the same or higher rent, the old tenant should be relieved of further obligation; if the new rent is lower, the old tenant may be liable for the difference. In either case, the old tenant could expect to be liable for the costs to the landlord of re-letting, including brokerage commissions and renovations.

Given the state of our current economic environment, tenant abandonments will undoubtedly increase. We think it is likely that the *Rios* holding will ultimately be challenged in New York's highest appellate court. It is also possible, though, that the legislature could step in and enact new legislation to protect residential tenants in these circumstances. For now, all tenants should stay tuned to this issue. If you would like to discuss your own lease, please feel free to contact Steven Troup.

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