

NEW JERSEY REAL ESTATE LAW

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The commercial landlord's duty to mitigate damages

When faced with a default by a commercial tenant, the amount of prospective rent and other amounts due under a lease (the amounts due after the default) that the landlord can recover from the tenant is limited under the law of New Jersey, and most states, by the landlord's duty to "miti-



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gate" its damages — that is, to make reasonable efforts to re-let the premises. If it fails to make such efforts, the landlord's potential recovery may be reduced by the amount that a court or jury finds that it "should have" reduced its losses through reasonably diligent efforts. The mitigation duty does not only affect

landlords' ability to recover lost rent through litigation; it is also often used by savvy tenants and their counsel to gain leverage in post-default settlement negotiations.

It is easy for a defaulting tenant to cast doubt on the landlord's mitigation efforts, even when the landlord is genuinely trying to re-let the premises. Among other things, tenants may quibble with: the listing amounts, claiming that they are too high (delaying re-rental) or too low (generating too little income); whether enough

effort was put into marketing the property; whether leads were pursued; whether the property was adequately rehabilitated, etc. Thus, what may, from the landlord's perspective, be a relatively straightforward lawsuit to recover rent can become significantly more protracted and complex, involving extensive discovery and expert testimony concerning the "mitigation issue."

For this reason, after a default, a landlord should take prompt actions to re-let the premises. (In New Jersey, a

landlord also may, but is not required to, mitigate by other means, for example selling the premises.) The landlord bears the burden of proving that it took diligent efforts to mitigate and should keep good records of what is being done — hiring brokers, advertising, e-mailing, site visits, listings, etc. The broker should as well. Everything that is done by the landlord or on its behalf can be evidence that it can use to prove its mitigation efforts.

Courts have not provided a blueprint for what, specifically, constitutes "diligent" or "reasonable" efforts to mitigate. However, in a case concerning a residential lease, various considerations were cited, including whether the property was shown or advertised, a broker was engaged, and a "For Rent" sign put up. What constitutes adequate mitigation efforts is made on a case-by-case basis.

Commercial leases sometimes include a provision whereby the tenant waives the landlord's duty to mitigate. If enforceable, such a provision not only will help to ensure the landlord's ability to recover in the face of a default, but it also can significantly reduce the cost and complexity of legal efforts to recover rent and also reduce the tenant's leverage in negotiating a settlement.

Whether such waivers are enforceable in New Jersey is unsettled. Although a number of other jurisdictions enforce them, they contravene the common law policy requiring parties to try to minimize losses. On the other hand, the only party hurt by such a waiver is the tenant, who agreed to it, and there is also a strong policy favoring freedom of contract that supports enforcement of such waivers, at least in the context of commercial leases.

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