

## **Leasing Lite - Commercial Leasing 101 - Commercial Landlord's Duty to Mitigate Losses in Illinois**

What is the law in Illinois when a tenant vacates a commercial premises prior to the expiration of the Lease? Is a landlord obligated to expend a lot of effort and money to find a replacement tenant?

Those of us that regularly negotiate Commercial Leases frequently see the provisions that state that if "the tenant abandons the premises, the landlord may, but need not, relet the premises for the account of the tenant" or something with similar effect. Some commercial leases may be even more broadly worded to state: "landlord may, but shall be under no obligation so to do, relet all or any part of the premises for such rent and upon such terms as shall be satisfactory to landlord (including the right to relet the premises for a term greater or lesser than that remaining under the Lease term, and the right to relet the premises as a part of a larger area, and the right to change the character or use made of the premises)". As a practitioner representing either landlords or tenants have you ever stopped to consider the implications of such language in commercial leases?

These lease terms are meant to relieve any sort of duty on the part of a landlord to find a replacement tenant in such a situation. However, this language runs contrary to the law in the State of Illinois. Pursuant to Illinois Statute, Section 9-213.1, Duty or Defense, "After January 1, 1984, a landlord or his or her agent shall take reasonable measures to mitigate the damages

recoverable against a defaulting lessee.” So if that is the law in Illinois, does a landlord have an affirmative obligation to relet its premises in such a situation notwithstanding any language in the lease to the contrary?

In the recent case of *The Takiff Properties Group Ltd. #2 v. GTI Life, Inc.* (2018 IL App (1st) 171477), the Illinois Appellate Court for the First District considered the implications of a similar lease provision. The Takiff Properties Group Ltd. #2/landlord sued the defendant/tenant for overdue rent due to its abandonment of the commercial premises prior to the expiration date of the lease. The lease that was the subject of the litigation was set to expire on October 31, 2014, and the tenant vacated the premises in early March 2014. The landlord sued the tenant seeking the payment of rent for this period. However, the tenant counterclaimed admitting a certain amount of rent was due but asserting that a lesser amount was due as the Landlord failed to exercise reasonable diligence to mitigate damages (i.e. re-lease the premises). The tenant claimed that the parties to the lease could not contract away a landlord’s “statutory duty to mitigate damages” as landlords have an affirmative obligation to mitigate pursuant to the laws of the State of Illinois.

The landlord argued that pursuant to the express terms of the lease, “if the Tenant abandons the premises, the Landlord may, but need not, relet the premises.” The Illinois Appellate Court for the First District found that the tenant has contractually waived landlord’s duty to mitigate, and rejected the assertion that such duty could not be waived.

Therefore, when representing a commercial landlord in Illinois, it is important to include language in your commercial leases

similar to those above that state that the landlord does not have a duty to mitigate its damages, otherwise if the lease is silent, the landlord will most likely have a statutory duty to mitigate any such damages. Conversely, when representing a tenant it is important to negotiate a reasonable affirmative duty on the part of landlord to mitigate damages in the event of a tenant default.

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