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BRIEFING

NEW YORK LANDLORDS DO NOT HAVE TO MITIGATE THEIR DAMAGES

AUGUST 2016

- A COMMERCIAL LANDLORD CAN HINDER AN OUTGOING TENANT'S EFFORTS IN FINDING A REPLACEMENT
- THE NEW YORK COURT OF APPEALS HAS REAFFIRMED THE PRINCIPLE THAT A COMMERCIAL LANDLORD HAS NO DUTY TO MITIGATE ITS DAMAGES
- PARTIES CAN STILL AGREE TO ASSUME OBLIGATIONS TO MITIGATE DAMAGES BY DRAFTING AGREEMENTS THAT MAKE THEIR INTENTIONS CLEAR

The New York Court of Appeals recently reaffirmed the well-established principle that commercial landlords in New York have no duty to mitigate their damages when a tenant abandons its lease. The case of *230 Park Avenue v. Kurzman*[1] is notable because in addition to this relatively straightforward principle of New York real estate law, it stands for the proposition that a commercial landlord may actively obstruct an abandoning tenant's efforts to find a replacement tenant to mitigate the landlord's damages. In this case, New York's highest court held that unless a landlord expressly and explicitly assumes a contractual duty to mitigate, it has no duty to mitigate its damages even when it agrees that the tenant will find and/or offer a potential new tenant to the landlord for the remainder of the original lease.

Facts

230 Park Avenue v. Kurzman arose from a dispute dating back to the fall of 2011 when the commercial tenant of office space, Kurzman, informed the landlord, 230 Park, that it had signed a lease in another building and that it wanted to discuss an exit "that works for both parties". The next day, the landlord sent a letter threatening to bring an eviction proceeding relating to certain allegedly unpaid real estate escalation charges. The tenant responded by offering to "enter into a stipulation wherein [it] would deliver possession to the landlord and each party would reserve all other claims, rights, remedies and defenses"[2]. The landlord chose not to enter into that stipulation and, instead, brought an action to reclaim the premises. This was settled about three weeks later by entering a different stipulation. The settlement

[1] *230 Park Ave. Holdco, LLC v. Kurzman Karelsen & Frank, LLP*, No. 653178/2011, 2013 WL 1934378 *2 (N.Y. Sup. Ct. April 30, 2013).
[2] *Id.* at *2.

stipulation expressly contemplated that the tenant would attempt to find a replacement tenant for the last 16 months of the lease and provided expressly that "nothing herein shall prohibit [the tenant] from locating and/or offering [the landlord] a potential tenant for the Premises, subject to [the landlord's] approval"[3]. Following the execution of the settlement stipulation, the tenant vacated the premises. Approximately six weeks later, the landlord filed an action seeking rent and other amounts due from the date on which the tenant vacated the premises through the expiration of the lease, which would occur 13 months later.

"THE TENANT ARGUES THAT IT WAS NOT LIABLE FOR THE REMAINING RENT … BECAUSE THE LANDLORD…FAILED TO MITIGATE ITS DAMAGES BY SABOTAGING THE TENANT'S ATTEMPTS TO SECURE A REPLACEMENT TENANT."

In response, the tenant argued that it was not liable for the remaining rent due under the lease because, among other things, the landlord breached the stipulation and failed to mitigate its damages by sabotaging the tenant's attempts to secure a replacement tenant. In support of its defense, the tenant established that the landlord's managing agent asked CoStar – a commercial real estate listing service – to remove the tenant's listing advertising the office space for sublet. The tenant also asserted that the landlord prevented it from showing the office space to potential replacement tenants and interfered with its right to otherwise list the premises.

The landlord responded by moving for summary judgment. It did not dispute that it had done what the tenant alleged. Instead, the landlord argued that even though the stipulation acknowledged that the tenant intended to try to find a replacement tenant, the stipulation did not create any affirmative obligation on the part of the landlord to relet the office space or mitigate its damages.

Courts' decisions

The trial court denied the landlord's motion for summary judgment, holding that there were triable issues of fact as to whether it breached the stipulation by interfering with the tenant's efforts to find a replacement tenant.

In a 3:2 decision, the Appellate Division, First Department, affirmed the lower court's ruling, finding that the stipulation obligated the landlord to provide the tenant with an opportunity to mitigate the landlord's damages. In his dissent, however, Justice DeGrasse noted that the stipulation did not create an affirmative obligation on the part of the landlord, but, instead, merely provided that it did not prohibit the tenant from locating or offering potential replacement tenants[4]. Therefore, he reasoned that the landlord did not agree to provide the tenant with an affirmative right to mitigate and did not obligate itself to do so.

On appeal to the Court of Appeals, despite evidence that the landlord proactively stymied the tenant's efforts to mitigate its damages, the Court of Appeals overturned the Appellate Division and dismissed the tenant's defense. In modifying the Appellate Division's decision and granting the landlord's motion, the Court of Appeals tacitly adopted Justice DeGrasse's dissent from the Appellate Division's majority opinion. Justice DeGrasse's reasoning and the Court of Appeals' decision are noteworthy because when a landlord agrees not to prohibit a tenant from finding replacement tenants it is not illogical to assume that the landlord cannot then actively obstruct this process. However, in the instant case, the Court of Appeals found the opposite to be true, namely that a landlord can actively hinder a tenant's mitigation efforts even after agreeing that a tenant will be allowed to mitigate damages.

[3] *230 Park Ave. Holdco, LLC v. Kurzman Karelsen & Frank, LLP*, 124 A.D.3d 477, 478, 2 N.Y.S.3d 433, 434 (N.Y. App. Div. 2015)
[4] *Id.* at 479-480.

"ALL IS NOT LOST FOR LANDLORDS WANTING TO CREATE ENFORCEABLE OBLIGATIONS TO MITIGATE."

What this means for landlords and tenants

Despite this decision, all is not lost for landlords and tenants wanting to create enforceable obligations to mitigate. *230 Park Avenue v. Kurman* does not preclude parties to a lease from agreeing between themselves to assume obligations to mitigate damages. However, to ensure that those obligations are enforceable, parties must draft such agreements to make clear their intent to create an affirmative obligation to mitigate.

FOR MORE INFORMATION

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