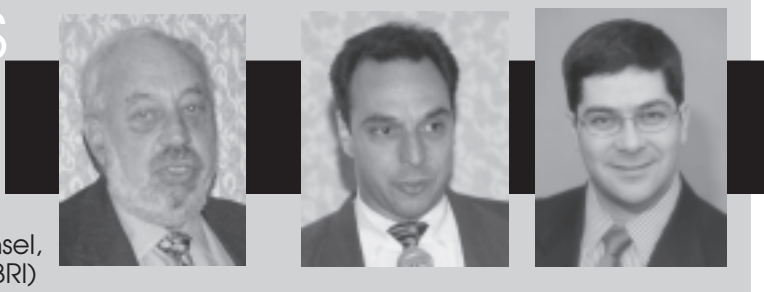


Ruling States That a Landlord Is Not Required to Mitigate Damages For Residential Lease Breaches

COUNSEL'S CORNER

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WHITE PLAINS—The Appellate Division Second Department has determined that where a tenant in a residential lease defaults, the Landlord need not mitigate its damages. Contrary to prior holdings of various lower courts the Appellate Division held that standard contract principles apply.

In the case of *Rios v. Carillo*, 2008 NY Slip Op 06143 [53 AD3d 111], the Landlord had entered into a two-year lease with the tenant in 2000. The Tenant "skipped" (vacated) in 2001, prior to expiration of the term of the lease. At the time the Tenant moved out of the apartment he stopped paying rent, purportedly with the consent of the Landlord. The Landlord sued the tenant to recover the unpaid rent. The lower Court dismissed the case on the basis that the Landlord failed to mitigate its damages, in other words, that the Landlord had failed to try to re-rent the apartment.

The Appellate Division Second Department, the second highest court in New York, has now held that the Supreme

Court, which decided the matter and dismissed the case, was wrong and that the Landlord was not required to mitigate its damages.

The Supreme Court had "relied on a line of cases stemming from the decision of the Appellate Term, Second and Eleventh Judicial Districts, in *Paragon Indus. v Williams* (122 Misc 2d 628, 629 [1983]) (*Rios v. Carillo*, *id*) which, in turn, relied on federal case law. The Appellate Division noted that even this line or string of cases had not been "uniformly applied." The Appellate Division cited *Callender v Titus*, 4 Misc 3d 126[A], 2004 NY Slip Op 50608[U] [2004] and *Duda v Thompson*, 169 Misc 2d 649 [1996] as cases wherein the Landlord was not required to mitigate its damages. Thus, at a minimum, there was confusion on this issue, although it is fair to say that most Courts required mitigation in a residential lease situation.

More Info

The Appellate Division went on to hold that:

"The Supreme Court's reliance on *Paragon Indus. v Williams* (122 Misc 2d 628 [1983]) and its progeny is misplaced. Well-settled law in this state imposes no duty on a residential landlord to mitigate damages (see *Holy Props. v Cole Prods.*, 87 NY2d 130 [1995];

"While Landlords may certainly take comfort in the idea that they may no longer be required to mitigate in the event of a tenant breach, they should nonetheless take care in the drafting of their leases to make sure that the requisite language is included and that they do not accept the surrender by the tenant and nullify the lease language."

Whitehouse Estates v Post, 173 Misc 2d 558 [1997]). As noted by the Court of Appeals in *Holy Props. v Cole Prods.* (87 NY2d at 133):

"The law imposes upon a party subjected to injury from breach of contract, the duty of making reasonable exertions to minimize the injury. Leases are not subject to this general

rule, however, for, unlike executory contracts, leases have been historically recognized as a present transfer of an estate in real property. Once the lease is executed, the lessee's obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages."

A Clear Ruling

The *Holy Props* case was a Court of Appeals decision, the highest Court in the State of New York. The Appellate Division noted that the *Holy Props*

pertained to a commercial lease, but the holding, as set forth above, refutes the idea that it would apply only to commercial leases. The Court held that "there is simply no basis for limiting the broad language of *Holy Props.*"

However, the Appellate Division did note that the Court in *Holy Props* did reference the

language in leases expressly stating that the Landlord was under no duty to mitigate and that the Tenant would be responsible for mitigating in the event of a breach. The Appellate Division further referenced the similar clauses in the lease in *Rios v. Carillo*. The Court also referenced the idea that a surrender, accepted by the Landlord might limit or eliminate the applicability of Tenant's liability in the event of a breach.

While Landlords may certainly take comfort in the idea that they may no longer be required to mitigate in the event of a tenant breach, they should nonetheless take care in the drafting of their leases to make sure that the requisite language is included and that they do not accept the surrender by the tenant and nullify the lease language. Moreover, there is always the practical aspect of the uncertainty of litigation against a defaulting tenant compared to the certainty of rental to a new tenant. We recommend that you consult counsel when drafting a lease and/or default notice or letter so as to protect your rights as a landlord.

Editor's Note: Finger and Finger, A Professional Corporation, is based in White Plains. Kenneth J. Finger is Chief Counsel to the Building and Realty Institute of Westchester and the Mid-Hudson Region (BRI).

Local Legislators Provide Affordable Housing Units

WHITE PLAINS—In response to what spokesmen termed as "Westchester County's ever-present need for affordable housing," the County Board of Legislators recently approved a measure to provide 163 affordable rental units in Sleepy Hollow.

Legislators approved \$1.489 million in New Homes Land Acquisition (NHLA) funds toward the purchase of the 2.4 acre site known as College Arms, spokesmen for the board recently announced.

"Legislator Lois Bronz, who represents the area, was the prime mover for this important investment for Westchester County," said Ken Jenkins, who chairs the board's Committee on Government Operations. "We must do everything

we can to protect existing affordable housing, and this is an excellent project that allows us to do that."

College Arms, at 100 College Avenue, was originally constructed as a U.S. Dept. of Housing & Urban Development (HUD) low-income housing project in the early 1970's. Now in need of rehabilitation and approaching the end of its affordability period, the county will purchase the property through its NHLA program, a fund established specifically for addressing affordable housing needs in Westchester.

"The county, through its NHLA program, continues to make smart investments that add more and more affordable units to the county-wide inventory of housing," said County

Board Chair Bill Ryan. "This helps our working families remain in Westchester."

The developer, SH Housing Associates LLC of Peekskill, will finance the rest of the project's purchase and the

bulk of the extensive renovations the current building needs, spokesmen said. The housing will remain affordable for a minimum of 50 years.

The College Arms development will include one to three

bedroom apartments, ranging from \$1,000 to \$1,500 per month in rent. The units will be rented to households with incomes at or below 60 percent of the county's median income, officials said.

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