



An Arizona's Landlord's Duty to Mitigate Damages

Nancy Swift, Esq.

In Arizona, a commercial landlord has a duty to mitigate its damages after a tenant abandons the premises. This obligation requires the landlord to take reasonable steps to put in place a replacement tenant as soon as possible so that its damages cease to accrue, or at least are decreased. In lawsuits for unpaid rent under commercial leases, such as for shopping center and office buildings, Arizona judges typically will require landlords to elucidate the steps they have taken to mitigate their damages. A landlord cannot simply sit back and watch the unpaid rent accrue month after month, and then ask a Court to enter Judgment for those unpaid amounts. The landlord has to show the Court that it has undertaken "reasonable" efforts to relet the subject premises "at a fair rental". *Stewart Title & Trust of Tucson v. Pribbeno*, 129 Ariz. 15, 16, 628 P.2d 52, 53 (Ct. App. 1981), quoting *Dushoff v. Phoenix Co.*, 22 Ariz.App. 445, 449, 528 P.2d 637, 641 (1974).

What constitute "reasonable" efforts? Not surprisingly, whether the landlord has undertaken reasonable efforts depends on the totality of the circumstances. The circumstances of each specific situation will be important, as will be an economic analysis of the real estate market in your particular area. In the last five years, as the commercial real estate market saw increased vacancies, Arizona judges became more sympathetic to landlords who were unable to find a replacement tenant at a fair rental, and judges loosened the requirements on landlords to show each step they took to market the subject premises.

Case law in Arizona sets out the kinds of activities a landlord should undertake when trying to mitigate its damages. Such activities include posting signs at the premises, holding showings of the specific space (although during the economic downturn Courts understood that there would be minimal showings), listing the property on national databases such as Loop Net and CoStar, sending out email blasts to local and national real estate brokers, and listing the property in trade publications. The cases make clear that the landlord's efforts need not be Herculean. Reasonableness is the standard.

Reasonableness is a relative term. For example, occasionally the tenant's counsel will present evidence that every office building within a one mile radius has "For Lease" signs in the windows, but your building does not. Therefore, the tenant will argue, your efforts are not reasonable because a potential replacement tenant passing by the building cannot tell that your space is available for rent.

One impediment to mitigation that often arises is the case of a defaulting tenant who vacates the premises and leaves the space in a shambles. The landlord will argue that it cannot be expected to market and conduct showings at a location that is unappealing, or that is filled with garbage, through no fault of its own. A landlord may argue that it is not possible to show the subject space for a period of months while the space is refurbished. This can be a compelling argument, but it also can fall flat when the period of time needed to return the space to "marketable" condition becomes unreasonably protracted.

A landlord's duty to take reasonable steps to mitigate its damages does not impose the requirement to take the first tenant who comes along. The landlord should be prepared to provide evidence to demonstrate why a potential tenant was not accepted. The landlord cannot unreasonably reject an otherwise suitable tenant, but is not required to enter into a lease with a tenant who is financially questionable, or incompatible with the tenant mix in the building or shopping center.

For all landlords, as soon as you know a tenant has abandoned the premises, it is essential to list the space, put up "for rent" signs, and start to make the space presentable to prospective replacement tenants. At the end of the day, you do not want your damage award reduced because you failed to take reasonable steps to relet your premises at a fair rental price.



Nancy Swift is Senior Counsel in the Labor & Employment and Litigation Practice Groups in the Scottsdale office. She can be reached at 480.383.1804 or nswift@buchalter.com.