87 N.Y.2d 130
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Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.
87 N.Y.2d 130, 637 N.Y.S.2d 964
N.Y. 1995.

87 N.Y.2d 130661 N.E.2d 694, 637 N.Y.S.2d 964, 1995 WL 722874

Holy Properties Limited, L. P., Respondent,
v.
Kenneth Cole Productions, Inc., Appellant.
Court of Appeals of New York

Argued October 19, 1995;
Decided December 7, 1995

CITE TITLE AS: Holy Props. v Cole Prods.

SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that Court, entered October 11, 1994, which affirmed a judgment of the Supreme Court (Jane S. Solomon, J.), entered in New York County after a nonjury trial, awarding plaintiff the total sum of $718,841.51 against defendant.

Holy Props. v Cole Prods., 208 AD2d 394, affirmed.

HEADNOTES

Landlord and Tenant--Landlord's Duty to Mitigate Damages

(1) In an action seeking rent arrears and damages in connection with a lease of commercial premises that provided plaintiff landlord was under no duty to mitigate damages, and that upon defendant tenant's abandonment of the premises or eviction it would remain liable for all monetary obligations arising under the lease, plaintiff landlord did not have a duty to mitigate its damages after the tenant's abandonment of the premises and subsequent eviction. While 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. 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. Thus, once defendant tenant abandoned the premises prior to the expiration of the lease, the landlord was within its rights under New York law to do nothing and collect the full rent due under the lease. Moreover, although an eviction terminates the landlord-tenant relationship, the parties to a lease are not foreclosed from contracting as they please; accordingly, if, as here, the lease provides that the tenant shall be liable for rent after eviction, the provision is enforceable.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Landlord and Tenant, § 816.

NY Jur 2d, Landlord and Tenant, §§ 112, 115, 406, 786.

NY Real Prop Serv, §§ 75:46, 75:47.

ANNOTATION REFERENCES

Landlord's duty, on tenant's failure to occupy, or abandonment of, premises, to mitigate damages by accepting or procuring another tenant. 21 ALR3d 534.***131**

POINTS OF COUNSEL

Fischbein Badillo Wagner Itzler, New York City (*Bruce H. Wiener*, *Bentley Kassal*, *Kenneth G. Schwarz* and *Deborah J. Locitzer* of counsel), for appellant.

I. The traditional no-mitigation rule does not apply to modern commercial leases. *(Matter of Hevenor,* 144 NY 271;*Kottler v New York Bargain House,* 242 NY 28;*Lenco, Inc. v Hirschfeld,* 247 NY 44;*Hermitage Co. v Levine,* 248 NY 333;*International Publs. v Matchabelli,* 260 NY 451;*Javins v First Natl. Realty Corp.,* 428 F2d 1071, 400 US 925;*Park W. Mgt. Corp. v Mitchell,* 47 NY2d 316;*Backer Mgt. Corp. v Acme Quilting Co.,* 46 NY2d 211;*City of New York v Farrell Lines,* 30 NY2d 76;*57 E. 54 Realty Corp. v Gay Nineties Realty Corp.,* 71 Misc 2d 353.)

II. Paragraph 18 of the governing lease does not relieve the landlord, upon its reentry, of the duty to mitigate its damages. *(Grays v Brooks,* 148 Misc 2d 646;*Cox v Dorlon Assocs.,* 113 Misc 2d 670;*Orr v Doubleday, Page & Co.,* 223 NY 334;*Rodolitz v Neptune Paper Prods.,* 22 NY2d 383;*Backer Mgt. Corp. v Acme Quilting Co.,* 46 NY2d 211;*City of New York v Farrell Lines,* 30 NY2d 76;*Fabulous Stationers v Regency Joint Venture,* 44 AD2d 547;*Broad Props. v Wheels Inc.,* 43 AD2d 276, 35 NY2d 821;*Kenilworth Realty Trust v Bankers Trust Co.,* 112 Misc 2d 523;*67 Wall St. Co. v Franklin Natl. Bank,* 37 NY2d 245.)

III. The Court below's cases offer conflicting views regarding a landlord's duty to mitigate damages. *(Syndicate Bldg. Corp. v Lorber,* 128 AD2d 381;*Wallis v Falken-Smith,* 136 AD2d 506;*Howard Stores Corp. v Robison Rayon Co.,* 36 AD2d 911;*Mitchell & Titus Assocs. v Mesh Realty Corp.,* 160 AD2d 465;*Sage Realty Corp. v Kenbee Mgt.-N. Y.,* 182 AD2d 480;*11 Park Place Assocs. v Barnes,* 202 AD2d 292;*Comar Babylon Co. v Goldberg,* 116 AD2d 551;*Goldman v Orange County Ch.,* 121 AD2d 683;*Centurian Dev. v Kenford Co.,* 60 AD2d 96.)

IV. Many lower courts have vigorously advocated adopting a promitigation rule in both residential and commercial lease cases. *(Parkwood Realty Co. v Marcano,* 77 Misc 2d 690;*Lefrak v Lambert,* 89 Misc 2d 197, 93 Misc 2d 632;*Paragon Indus. v Williams,* 122 Misc 2d 628;*Grays v Brooks,* 148 Misc 2d 646;*Rubin v Dondysh,* 146 Misc 2d 37, 153 Misc 2d 657;*Forty Exch. Co. v Cohen,* 125 Misc 2d 475;*Douglas Manor House v Wohlfeld,* 66 Misc 2d 265.)

V. Recent surveys demonstrate that a majority of States impose a duty to mitigate on commercial landlords.

VI. Public policy dictates adopting a promitigation rule for commercial landlords. *(Parsons v Sutton,* 66 NY 92;*Hamilton v McPherson,* 28 NY 72;*Bing v Thunig,* 2 NY2d 656;*Park W. Mgt. Corp. v Mitchell,* 47 NY2d 316.)***132**

Finkelstein, Borah, Schwartz, Altschuler & Goldstein, P. C., New York City *(Jeffrey R. Metz, Robert D. Goldstein, David R. Brody* and *Steven L. Schultz* of counsel), for respondent.

I. The Court below properly applied the plain language in the lease agreement between the parties. *(Hall v Gould,* 13 NY 127;*International Publs. v Matchabelli,* 260 NY 451;*Mann v Munch Brewery,* 225 NY 189;*186-90 Joralemon Assocs. v Dianzon,* 161 AD2d 329;*Backer Mgt. Corp. v Acme Quilting Co.,* 46 NY2d 211;*812 Park Ave. Corp. v Pescara,* 268 App Div 436, 294 NY 792;*Morgan Servs. v Lavan Corp.,* 59 NY2d 796;*Truck Rent-A-Ctr. v Puritan Farms 2nd,* 41 NY2d 420;*Boyle v Petric Stores Corp.,* 136 Misc 2d 380;*Musman v Modern Deb,* 50 AD2d 761.)

II. The parties negotiated a mitigation provision which placed the burden of mitigation upon the tenant.

III. The Court below properly followed the law. *(Becar v Flues,* 64 NY 518;*Underhill v Collins,* 132 NY 269;*Sancourt Realty Corp. v Dowling,* 220 App Div 660;*Syndicate Bldg. Corp. v Lorber,* 128 AD2d 381;*Mitchell & Titus Assocs. v Mesh Realty Corp.,* 160 AD2d 465;*Sage Realty Corp. v Kenbee Mgt.-N. Y.,* 182 AD2d 480;*11 Park Place Assocs. v Barnes,* 202 AD2d 292;*Milltown Park v American Felt & Filter Co.,* 180 AD2d 235;*Treeforms, Inc. v Action Audio,* 102 AD2d 920;*Centurian Dev. v Kenford Co.,* 60 AD2d 96.)

IV. Public policy supports a continuation of the no-

mitigation rule for commercial tenancies.

Carb, Luria, Glassner, Cook & Kufeld, LLP, New York City (*James E. Schwartz* and *Carol W. Duffy* of counsel), for The Real Estate Board of New York, Inc., *amicus curiae.*

I. The court should reaffirm the long-standing rule that a landlord has no duty to mitigate damages where a commercial tenant unjustifiably abandons its premises before the expiration of the lease term. *(Becar v Flues,* 64 NY 518;*Sancourt Realty Corp. v Dowling,* 220 App Div 660;*Centurian Dev. v Kenford Co.,* 60 AD2d 96;*Syndicate Bldg. Corp. v Lorber,* 128 AD2d 381;*Mitchell & Titus Assocs. v Mesh Realty Corp.,* 160 AD2d 465;*Sage Realty Corp. v Kenbee Mgt.-N. Y.,* 182 AD2d 480;*11 Park Place Assocs. v Barnes,* 202 AD2d 292;*Auerbach v Bennett,* 47 NY2d 619;*Matter of Eckart,* 39 NY2d 493;*Maxton Bldrs. v Lo Galbo,* 68 NY2d 373.)II. Paragraph 18 of the lease relieves the landlord of any duty to mitigate. *(Tov Knitting Mills v Starr Realty Co.,* 148 AD2d 526;*812 Park Ave. Corp. v Pescara,* 268 App Div 436, 294 NY 792;*Hall v Gould,* 13 NY 127;*International Publs. v Matchabelli,* 260 NY 451;*Mann v Munch Brewery,* 225 NY 189;*Comar Babylon Co. v Goldberg,* 116 AD2d 551;*Halpern v Bargans,* 46 AD2d 657;***133***150/160 Assocs. v Mojo-Stumer Architects,* 174 AD2d 658;*Lenco, Inc. v Hirschfeld,* 247 NY 44;*Kalisch-Jarcho, Inc. v City of New York,* 58 NY2d 377.)

OPINION OF THE COURT

Simons, J.

In 1985, defendant Kenneth Cole Productions, Inc. entered into a written lease for premises in a commercial office building located at 29 West 57th Street in Manhattan. The term was to commence on January 1, 1985 and end on December 31, 1994. In December 1991, following a change of owners and an alleged deterioration in the level and quality of building services, defendant vacated the premises. Shortly thereafter, the new owner, plaintiff Holy Properties Limited, L.P., commenced a summary eviction proceeding against defendant for the non-payment of rent. It obtained a judgment and warrant of eviction on May 19, 1992 and subsequently instituted this action seeking rent arrears and damages. At trial defendant asserted, as an affirmative defense, that plaintiff had failed to mitigate damages by deliberately failing to show or offer the premises to prospective replacement tenants. Supreme Court entered judgment for plaintiff, holding that defendant had breached the lease without cause and that plaintiff had no duty to mitigate damages. The Appellate Division affirmed.

The issue is whether, on these facts, the landlord had a duty to mitigate its damages after the tenant's abandonment of the premises and subsequent eviction.

The law imposes upon a party subjected to injury from breach of contract, the duty of making reasonable exertions to minimize the injury (*Wilmot v State of New York,* 32 NY2d 164, 168-169;*Losei Realty Corp. v City of New York,* 254 NY 41, 47). 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 (*see, Becar v Flues,* 64 NY 518, 520;*Reichert v Spiess,* 203 App Div 134, 139;*see also, Centurian Dev. v Kenford Co.,* 60 AD2d 96). 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 (2 Rasch, New York Landlord and Tenant § 26:22 [3d ed 1988]).

When defendant abandoned these premises prior to expiration of the lease, the landlord had three options: (1) it could do nothing and collect the full rent due under the lease (***134***Becar v Flues,* 64 NY 518,*supra; Sancourt Realty Corp. v Dowling,* 220 App Div 660), (2) it could accept the tenant's surrender, reenter the premises and relet them for its own account thereby releasing the tenant from fur-

ther liability for rent, or (3) it could notify the tenant that it was entering and reletting the premises for the tenant's benefit. If the landlord relets the premises for the benefit of the tenant, the rent collected would be apportioned first to repay the landlord's expenses in reentering and reletting and then to pay the tenant's rent obligation (*see*, lease para 18; *Underhill v Collins*, 132 NY 269;*Centurian Dev. v Kenford Co.*, *supra*). Once the tenant abandoned the premises prior to the expiration of the lease, however, the landlord was within its rights under New York law to do nothing and collect the full rent due under the lease (*see*, *Becar*, 64 NY 518,*supra; Underhill v Collins*, 132 NY 269,*supra; Matter of Hevenor*, 144 NY 271).

Defendant urges us to reject this settled law and adopt the contract rationale recognized by some courts in this State and elsewhere. We decline to do so. Parties who engage in transactions based on prevailing law must be able to rely on the stability of such precedents. In business transactions, particularly, the certainty of settled rules is often more important than whether the established rule is better than another or even whether it is the "correct" rule (*see*, *Maxton Bldrs. v Lo Galbo*, 68 NY2d 373, 381). This is perhaps true in real property more than any other area of the law, where established precedents are not lightly to be set aside (*Heyert v Orange & Rockland Utils.*, 17 NY2d 352, 360).

Defendant contends that even if it is liable for rent after abandoning the premises, plaintiff terminated the landlord-tenant relationship shortly thereafter by instituting summary proceedings. After the eviction, it maintains, its only liability was for contract damages, not rent, and under contract law the landlord had a duty to mitigate. Although an eviction terminates the landlord-tenant relationship, the parties to a lease are not foreclosed from contracting as they please (*see*, *International Publs. v Matchabelli*, 260 NY 451, 454;*Mann v Munch Brewery*, 225 NY 189, 194;*Hall v Gould*, 13 NY 127, 133-134). If the lease provides that the tenant shall be liable for rent after eviction, the provision is enforceable (*id.*).

In this case, the lease expressly provided that plaintiff was under no duty to mitigate damages and that upon defendant's abandonment of the premises or eviction, it would remain liable for all monetary obligations arising under the lease (*see*, lease para 18).***135**

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Kaye and Judges Titone, Bellacosa, Smith, Levine and Ciparick concur.
Order affirmed, with costs.***136**

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