

BEWARE THE MOB



COUNSEL'S CORNER

Recently I had an opportunity to look, again, at a Texas Landlord's obligation to mitigate its damages when a Tenant breaches a Lease. It's hard to believe we have had this law since 1997 – almost 14 years now. And before that date we had appellate case decisions that led to Texas Property Code 91.006.

In September 2005, MOB 90 of Texas, LP, leased commercial property to Nejemie Alter MD's professional association. The property was in the Corpus Christi area, intended to be used as a medical office for five years. Alter personally guaranteed the lease obligation. Virtually no rent was paid during 2006, so MOB filed an eviction lawsuit against Alter.

Alter vacated in January 2007, and claimed that he only owed rental through that date. MOB had a different theory in mind, and claimed that Alter owed rental through the date of trial. The monthly rent was \$4,677. Rental owing through the date that Alter vacated was \$36,782, and that amount was not in dispute.

MOB requested judgment for \$93,220. Alter contested that amount, claiming that MOB failed to properly mitigate damages, as required by the Texas law.

Alter testified that as he passed by the MOB property there were no signs posted that the property was available to lease. To his knowledge, there were no visible efforts undertaken by MOB to re-lease the premises. Alter further testified that after he defaulted he attempted to negotiate a deal with MOB involving lesser space. Alter claimed that he was willing to pay weekly amounts.

At trial MOB's counsel called the property manager as a witness. Jean Shivers testified that typically for-lease signage was not used in medical office building settings. Shivers stated she had shown the premises three times since Alter was evicted, and that she had not leased any space in MOB's building since January 2007 – the date that Alter vacated.

Shivers also testified that she listed the premises on both Loopnet and Costar, kept in contact with personnel at Doctor's Regional Hospital, and that it was hardly unusual for it to take an extended period of time to re-lease commercial premises.

In any event, the Nueces County trial court entered judgment for MOB, but only for \$36,782. MOB appealed.

The Corpus Christi Court of Appeals, citing a landmark 1997 Texas Supreme Court decision, discussed the duty of a Texas landlord to take objectively reasonable efforts to mitigate damages and find a suitable replacement tenant, when the tenant breaches a lease and abandons the property. A Texas landlord is not required to take all known efforts or accept an unsuitable tenant.

The trial court was of the view that MOB failed to adequately mitigate because MOB refused to work with Alter, who had defaulted on the Lease. The trial court also concluded that MOB's efforts to mitigate by online listings, showing the property to those who expressed an interest and contacting the hospital administrators were insufficient.

The Court of Appeals disagreed, finding that since Alter did not prove that MOB's failure to mitigate damaged Alter in any way, the trial court made a mistake and MOB was owed \$93,220 in back rent through the date of trial.

The Court of Appeals also saw no duty of a Texas landlord to renegotiate its lease with a defaulting tenant. See MOB 90 of Texas, LP v. Nejemie Alter MD, PA (Texas Court of Appeals – Corpus Christi-Edinburg 2009).

MOB wins, Dr. Alter loses.

Bottom line:

1. Texas landlords must mitigate their damages. When practical I recommend signage, in addition to other objectively reasonable efforts. In that manner tenants can at least observe some of your efforts.
2. There is nothing in this case or the mitigation law which precludes Texas landlords from clearly defining their mitigation burden in the lease. Note, however, that Texas landlords may not force or allow a tenant to waive the landlord's burden of mitigation.
3. Beware the MOB.

Stuart A. Lautin, Esq.*
Counsel to North Texas Commercial
Association of REALTORS®, Inc.

* Board Certified, Commercial (1989)
and Residential (1988) Real Estate Law,
Texas Board of Legal Specialization

Higier Allen & Lautin, PC
5057 Keller Springs Road, Suite 600
Addison Texas 75001
P: 972.716.1888
E: slautin@higierallen.com
W: www.higierallen.com