

## Ask an Expert

### Warning! Warning! Mitigate Your Damages

If you're a New Jersey landlord with a commercial tenant, the law says that you can only recover damages that are unavoidable. This means that in order to be eligible to recover you must have made what the law calls "reasonable efforts" to "mitigate" your alleged losses.

So, stop the damage if you can. And don't rely on waivers in leases by tenants of the duty to mitigate damages by landlords. Those waivers may not be enforceable.

So, what are reasonable efforts? New Jersey law doesn't provide clear guidance, so answers are often decided on a case-by-case basis depending on the facts.

In fact, steps taken by landlords to meet the burden of using reasonable efforts can also be used by good tenant attorneys to cast doubt on whether landlords' mitigation efforts are reasonable.

Tenants often negotiate good settlements by claiming landlords failed to take the most reasonable courses of action to mitigate damages—even when landlords are genuinely doing their best. For example, tenants sometimes claim listing rents are too high to attract new tenants or too low to generate sufficient rent to offset losses. Tenants also allege that landlords don't hire the best brokers, offer enough "free rent" or "fit-out" allowances, fail to encourage expansions from adjoining tenants, pass up viable opportunities, fail to make the premises look marketable, and so on.

Did the owner do enough? Maybe. Possibly not. Litigation can be costly, so some landlords consider settling to avoid protracted litigation, which they could possibly lose.

If you're a landlord, the burden is on you to prove that you made reasonable efforts to mitigate damages when a tenant materially defaults.

When that happens, a plan should be devised and swift action taken. That means you should hire the best brokers for the market and type of property, require brokers to advertise in the press and digital media, maintain good (Landlord and broker) records, offer market rents with competitive free rent periods and fit out allowances,

promote site visits with cooperating brokers, post signs advertising the property, etc.

Everything done by landlords and their brokers can be evidence that can prove reasonable efforts.

Of course, landlord form leases should provide waivers of any duty to mitigate damages. But New Jersey law isn't clear if or when waivers are enforceable but tenants still try to negotiate to delete the waivers.

Competing public policies of mitigating damages versus the right to freely negotiate commercial leases are among reasons why enforceability of waivers is at times decided case-by-case. If enforceable, waivers can provide landlords with leverage and significantly reduce the



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Landlords in New Jersey (not in Pennsylvania currently) have a duty to mitigate damages.

cost and time it takes to recover damages. They can also discount the value of the tenant negotiation strategies discussed above. Remember that knowledge is power, so use it to you advantage.

Landlords and tenants should be aware of this duty and act accordingly during lease negotiations and in the event a tenant materially defaults.

*For more information on how best to negotiate a lease, handle a lease workout or be represented in a landlord-tenant dispute, contact Lloyd C. Birnbaum, Esq., a founding member of Lauletta Birnbaum LLC, who has more than 25 years of experience in commercial real estate at 215.299.2782 or 856-861-4062 or email: lbirnbaum@lauletta.com*

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