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Real Property - Landlord and Tenant - Lessor's Arbitrary Withholding of Consent to Sublease

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REAL PROPERTY—LANDLORD AND TENANT—LESSOR'S ARBITRARY WITHHOLDING OF CONSENT TO SUBLEASE—Defendant leased a portion of plaintiff's building for a seven-year period. Contained in the lease was a covenant whereby the lessee agreed not to assign or sublet without the lessor's consent. One year prior to the expiration date of the lease, the defendant gave notice of his intention to vacate and submitted to the plaintiff a proposed sublease under which the premises would be rented to the Postmaster General of the United States. The plaintiff stipulated that the proposed sublessee was ready, able, and willing to assume the obligations of the original lease and was a proper sublessee in every respect. The plaintiff refused to consent to the subletting and, after the expiration date of the lease, brought suit for rent. Defendant asserted that it was the lessor's duty to lessen his damages by consenting to the sublease. On appeal from summary judgment for plaintiff, *held*, affirmed. The lessor does not have the duty to mitigate damages and may arbitrarily refuse to accept a subtenant. The lessor may recover from the lessee the full rental due. *Gruman v. Investors Diversified Services*, (Minn. 1956) 78 N.W. (2d) 377.

The Minnesota Supreme Court accepted the majority view that abandonment, unless followed by action of the lessor to effect a valid surrender, has no effect on the rights of the lessor. Upon such abandonment the lessor need not accept another tenant but may allow the premises to lie vacant

and hold the tenant for full rent.¹ The rule has its origin in the feudal concept of the landlord-tenant relationship whereby the tenant's covenant to pay rent was incidental to the more personal relationships imposed by the conveyance of an interest in land. The tenant, after his vows of homage, became the lord's man, under a duty to perform services such as protection of his lord in times of trouble. Leasing of the land was more than a mere business arrangement based on contract; it was a method of mutual survival, with each party providing protection and services for the other. Technically, rent was considered as something which a tenant rendered out of profits from the land and was spoken of as issuing out of the land.² The landlord's rights were fixed absolutely by the conveyance, and the liability of the tenant for rent was not lessened by the contract law concept of mitigation of damages. Although most jurisdictions today consider a lease as both a contract and a conveyance of an interest in land,³ a majority of courts still follow, with little question, the holdings of earlier cases in regard to the measure of recovery for breach by the lessee of his obligation. Justification for this view is sometimes found in the principle that a tenant cannot by his own wrong in abandoning the premises impose a duty to lessen losses upon the landlord.⁴ Moreover, to require the landlord to minimize his losses would be to destroy the value of a covenant not to sublet without the lessor's consent.⁵ A small minority of states, however, hold that after the lessee abandons the premises the lessor must use reasonable diligence to relet the property and thereby reduce resulting damages.⁶ Arbitrary refusal to consent to the subletting or to relet will prevent a lessor from recovering damages that he reasonably could have avoided.⁷ This seems to be a better approach to the rights and duties of the parties to a lease.⁸ The intention of the parties in the principal case was probably not to convey an interest in land, but only to make a contract for the hiring of a part of a building.⁹ It would appear to be just that contract principles re-

1 1 TIFFANY, LANDLORD AND TENANT §182, p. 1170 (1910); 1 AMERICAN LAW OF PROPERTY §3.99, p. 392 (1952). See 126 A.L.R. 1215 (1940) for a collection of cases.

2 Marsh v. Butterworth, 4 Mich. 575 (1857); Peck v. Northrop, 17 Conn. 217 (1845).

3 Sancourt Realty Corp. v. Dowling, 220 App. Div. 660, 222 N.Y.S. 288 (1927); 3 CORBIN, CONTRACTS §686 (1951).

4 Jordon v. Nickell, (Ky. 1952) 253 S.W. (2d) 237.

5 Boardman Realty Co. v. Carlin, 82 Conn. 413, 74 A. 831 (1909); Muller v. Beck, 94 N.J.L. 311, 110 A. 831 (1920).

6 Friedman v. Colonial Oil Co., 236 Iowa 140, 18 N.W. (2d) 196 (1945); Marmont v. Axe, 135 Kan. 368, 10 P. (2d) 826 (1932); Galvin v. Lowell, 257 Wis. 82, 42 N.W. (2d) 456 (1949). It appears reasonable that the duty to mitigate should be stronger if no positive action by the lessor is required in mitigating his damages, as is the case when the abandoning lessee presents a suitable and willing sublessee to the lessor. Of the cited cases, only in the Axe case did the lessee make a second tenant or sublessee available to the lessor.

7 The minority view does not distinguish between a suit for recovery of rent and one for damages for a breach of the covenant to pay rent.

8 2 POWELL, REAL PROPERTY, ¶229, n. 79 (1950); 34 HARV. L. REV. 217 (1920).

9 6 CORBIN, CONTRACTS §1356 (1951).

quiring a lessor to mitigate his damages be applied to an arrangement that is basically contractual in nature. In order to protect and conserve the economic welfare and prosperity of the community as a whole, the rules for awarding damages should discourage "persons against whom wrongs have been committed from passively suffering economic loss which could be averted by reasonable efforts."¹⁰ The principal case presented a situation sympathetic to the lessee. The tenant procured was of unquestionable economic stability. No positive action by the lessor would have been required to lessen its losses substantially. Minnesota, in following the majority view, refused to adopt what is suggested as the more liberal and justifiable course. A better result would be to uphold the clause requiring the lessor's consent to sublease, but after abandonment to require the lessor to relet the premises where a reasonably acceptable tenant is available, thus mitigating his damages. This same result might also be reached by interpreting the covenant as requiring that consent to a sublease not be unreasonably withheld. This construction probably preserves the intent of the parties. England has reached this result by statute.¹¹ It must be noted, however, that this approach has not been widely accepted in America, and there are no signs of a trend toward wider acceptance in the future.

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¹⁰ McCORMICK, DAMAGES §33, p. 127 (1935).

¹¹ 17-18 Geo. 5, c. 36, §19(1) (The Landlord and Tenant Act of 1927).