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Landlord-Tenant--Landlord's Duty to Relet When a Tenant Abandons Leased Property--Sommer v. Kridel

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LANDLORD-TENANT—LANDLORD'S DUTY TO RELET WHEN A TENANT ABANDONS LEASED PROPERTY

Sommer v. Kridel[1]

James Kridel entered into a two year residential lease with the landlord Abraham Sommer and paid one month's rent and a security deposit in advance. Thereafter, Kridel, never having assumed occupancy, requested Sommer to release him and accept the rent and deposit paid as consideration for the release. Sommer did not respond to this request, made no attempt to reenter, and affirmatively refused to relet the premises for over one year, at which time the apartment was leased to a third party. Sommer brought an action against Kridel for the total amount due under the lease during the period the premises were unoccupied. In his answer Kridel raised the defenses that the plaintiff landlord had failed to mitigate damages and had accepted his surrender of the premises.[2] The trial court's ruling for the defendant tenant on the issues of mitigation and acceptance of the surrender was reversed by the appeals court.[3] The New Jersey Supreme Court reversed and held that a landlord has an obligation to mitigate damages when he seeks to recover rents due from a defaulting tenant under a residential lease.[4] Overruling prior New Jersey cases,[5] the court reasoned that evolving social factors had led courts in New Jersey and other states[6] to apply contract principles to leases. The court indicated that its decision to apply

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1. 378 A.2d 767 (N.J. 1977). Riverview Realty Co. v. Perosio, 138 N.J. Super. 270, 350 A.2d 517 (1976), arose under a similar fact situation, and is considered as a companion case in the opinion.

2. Sommer v. Kridel, 378 A.2d 767, 769 (N.J. 1977).

3. *Id.* at 770.

4. *Id.* at 772-73. The court withheld judgment whether the rule also applies to commercial leases. It should be noted that matters concerning breach of a contract to make a lease, as opposed to breach of a covenant in a lease, are beyond the scope of this note; general contract principles are usually applied. For examples and discussion of the distinction see Ver Steeg v. Becker-Moore Paint Co., 106 Mo. App. 257, 80 S.W. 346 (St. L. Ct. App. 1904); Monger v. Lutterloh, 195 N.C. 274, 142 S.E. 12 (1928); 1 AMERICAN LAW OF PROPERTY § 3.17 (A.J. Casner ed. 1952); Hicks, *The Contractual Nature of Real Property Leases,* 24 BAYLOR L. REV. 443, 524 (1972); 52 C.J.S. *Landlord and Tenant* § 552 (1968).

5. New Jersey previously had not imposed the obligation on the landlord to mitigate damages. Joyce v. Bauman, 113 N.J.L. 438, 174 A. 693 (N.J. 1934); Muller v. Beck, 94 N.J.L. 311, 110 A. 831 (Sup. Ct. 1920). *But see* Zabriskie v. Sullivan, 80 N.J.L. 673, 77 A. 1075 (Sup. Ct. 1910), *aff'd,* 82 N.J.L. 545, 81 A. 1135 (N.J. 1911); Carey v. Hejke, 119 N.J.L. 594, 197 A. 652 (Sup. Ct. 1938).

6. Sommer v. Kridel, 378 A.2d 767, 771-72 (N.J. 1977).

such principles to the mitigation issue was required as a matter of basic fairness and equity.[7]

The rule set forth in *Sommer v. Kridel* is the minority rule in this country.[8] The majority rule is that a landlord has no duty[9] to mitigate damages when a tenant abandons leased property; the landlord may allow the property to remain idle and is entitled to collect rents as they come due.[10] This traditional view is supported by established property concepts which are a result of the historical development of landlord-tenant law.[11] Centuries ago courts discarded the notion that a lessee's interest was merely contractual[12] and found him to have a property interest in order to facilitate his protection against the lessor and third parties.[13] Transfer of the leasehold from the lessor to the lessee was interpreted as a conveyance and any contract provisions in the lease were considered incidental to the property interest.[14]

This view of a lease as a conveyance of the landlord's interest for a term, with the tenant becoming the lawful but limited owner of the

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7. *Id.* at 773.

8. *See* text accompanying notes 23-41 *infra.*

9. In this context "duty" is not used in the sense of a legal duty because no corresponding right exists. A breach of the duty does not give rise to liability, but instead creates a barrier to recovery for the avoidable loss. *See* Annot., 21 A.L.R.3d 534 (1968); C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES 128 (1935).

10. *E.g.,* Riggs v. Murdock, 10 Ariz. App. 248, 458 P.2d 115 (1969); White v. Miller, 111 Conn. 53, 149 A. 237 (1930); Jordon v. Nickell, 253 S.W.2d 237 (Ky. Ct. App. 1952); Gruman v. Investors Diversified Serv., 247 Minn. 502, 78 N.W.2d 377 (1956); Stubbs v. Stuart, 469 S.W.2d 311 (Tex. Ct. App. 1971). 3 H. TIFFANY, THE LAW OF REAL PROPERTY § 902 (3d ed. 1939); 1 AMERICAN LAW OF PROPERTY § 3.99 (A.J. Casner ed. 1952); Hicks, *supra* note 4, at 516-25; McCormick, *The Rights of the Landlord Upon Abandonment of the Premises by the Tenant,* 23 MICH. L. REV. 211, 219-20 (1925); Annot., 21 A.L.R.3d 534 (1968); RESTATEMENT (SECOND) OF PROPERTY § 11.1(3), Comment i at 12 (Tent. Draft No. 3, 1975); 49 AM. JUR. 2d *Landlord and Tenant* §§ 619, 621 (1970); 52 C.J.S. *Landlord and Tenant* § 552 (1968).

11. For discussion of the evolution of leases, see Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back Again in 900 Years?,* 9 KAN. L. REV. 369 (1961); Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?,* 1975 WIS. L. REV. 19, 22-31.

12. Originally a tenant's interest under a term of years was held to be contractual. He was by definition "one who had no right in the land but merely the benefit of a contract." 2 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 36 (2d ed. 1909); 2 R. POWELL, THE LAW ON REAL PROPERTY ¶ 221, at 178-79 (1977). Often leases were given as means to secure a debt. 2 F. POLLACK & F. MAITLAND at 112, 117-24. Civil Law jurisdictions continue to regard a lease as a contract composed of mutually dependent covenants. *See* 6 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 893-899B (rev. ed. 1936); Love, *supra* note 11.

13. Love, *supra* note 11, at 22-31.

14. 2 R. POWELL, *supra* note 12; 1 AMERICAN LAW OF PROPERTY § 3.11 (A.J. Casner ed. 1952).

premises, is referred to frequently as a basis for the majority rule.[15] Thus, it is said that the law should not require the landlord to be responsible for what becomes of the tenant's "property," or impose an obligation upon him as a consequence of the tenant's wrongdoing.[16] Another reason for not conditioning an abandoning tenant's liability on the sufficiency of the landlord's efforts to relet is that historically all covenants in a lease were considered to be independent, and thus the lessee's obligation to pay rent was absolute and not dependent on the landlord's efforts to mitigate damages.[17]

Courts supporting the majority rule also have expressed a fear that the minority rule would result in the landlord's mitigation efforts being interpreted as an acceptance of the tenant's surrender of the premises and thereafter release the tenant from liability.[18] There is concern that this rule might encourage the tenant to abandon property, which would in turn be an invitation to vandalism,[19] and that the landlord would be required to accept otherwise unsuitable tenants for the purposes of mitigation of damages.[20]

Another factor said to weigh against the mitigation requirement focuses on the provisions of the lease and points out that the parties could have inserted a covenant to provide for mandatory mitigation; the absence of such a provision reflects the intent of the parties not to require

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15. *In re* Dant & Dant, 39 F. Supp. 753 (D. Ky.), *aff'd sub nom.* Kessler v. Jefferson Storage Corp., 125 F.2d 108 (6th Cir. 1941); Sommer v. Kridel, 378 A.2d 767 (N.J. 1977); Wright v. Baumann, 239 Or. 410, 398 P.2d 119 (1965); Hicks, *supra* note 4, at 516-25; McCormick, *supra* note 10, at 219-20.

16. Browne v. Dugan, 189 Ark. 551, 74 S.W.2d 640 (1934); West Side Auction House Co. v. Connecticut Mut. Life Ins. Co., 186 Ill. 156, 57 N.E. 839 (1900); Jordon v. Nickell, 253 S.W.2d 237 (Ky. Ct. App. 1952); Annot., 21 A.L.R.3d 534, 548-49 (1968).

17. West Side Auction House Co. v. Connecticut Mut. Life Ins. Co., 186 Ill. 156, 57 N.E. 839 (1900); Gruman v. Investors Diversified Serv., 247 Minn. 502, 78 N.W.2d 377 (1956); Sancourt Realty Corp. v. Dowling, 220 App. Div. 660, 222 N.Y.S. 288 (1927). 1 AMERICAN LAW OF PROPERTY § 3.11 (A.J. Casner ed. 1952). For a discussion of the independence of lease covenants, see Bennett, *The Modern Lease—An Estate in Land or a Contract (Damages for Anticipatory Breach and Interdependency of Covenants),* 16 TEX. L. REV. 47 (1937); Siegel, *Is the Modern Lease a Contract or a Conveyance? — A Historical Inquiry,* 52 J. OF URB. L. 649, 663-70 (1975).

18. Wohl v. Yelen, 22 Ill. App. 2d 455, 161 N.E.2d 339 (1959); Haycock v. Johnston, 81 Minn. 49, 83 N.W. 494 (1900); Groll, *Landlord-Tenant: The Duty to Mitigate Damages,* 17 DEPAUL L. REV. 311 (1968) (in order to encourage mitigation courts should be less receptive to arguments that the landlord's actions constituted an acceptance of the tenant's surrender); McCormick, *supra* note 10, at 211-14. See notes 84-91 and accompanying text *infra* for a discussion of means to alleviate this problem.

19. RESTATEMENT (SECOND) OF PROPERTY § 11.1, Comment i at 12 (Tent. Draft No. 3, 1975).

20. Wohl v. Yelen, 22 Ill. App. 2d 455, 161 N.E.2d 339 (1959).

it.[21] Some courts find the continued existence of the rule not requiring mitigation of damages warranted by the fact that landlords have entered into agreements in reliance on it.[22]

However, a steadily growing number of states have rejected the "no duty to mitigate" rule and its underlying rationale.[23] These states require that a landlord either mitigate damages by attempting to relet when a tenant abandons leased property or be precluded from recovering those damages the landlord could have avoided.[24] The landlord's duty usually is expressed in terms of "reasonable effort,"[25] "due diligence,"[26] or "reasonable diligence."[27]

This doctrine is supported by the argument that the nature of the lease has changed from a property oriented transaction to a contractual one; the instrument is no longer primarily a transfer of an interest in land, but is instead a package of goods and services containing numer-

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21. Hicks, *supra* note 4, at 517. *But see* Comment, *The Landlord's Duty to Mitigate by Accepting a Proffered Acceptable Subtenant—Illinois and Missouri,* 10 ST. LOUIS U.L.J. 532 (1966) (the use of standard form leases and the layman's lack of legal knowledge undermine the "intent of the parties" argument). The presence of a clause in the lease prohibiting the tenant from subleasing also had been mentioned as a factor in finding that the landlord has no duty to accept another tenant in order to mitigate damages. *E.g.,* Manley v. Kellar, 47 Del. 511, 94 A.2d 219 (1952); Muller v. Beck, 94 N.J.L. 311, 110 A. 831 (1920).

22. Hirsch v. Home Appliances, Inc., 242 Ill. App. 418 (1926); Gruman v. Investors Diversified Serv., 247 Minn. 502, 78 N.W.2d 377 (1956); Hicks, *supra* note 4, at 517.

23. 1 AMERICAN LAW OF PROPERTY § 3.99 (A.J. Casner ed. 1952); Note, *Contract Principles and Leases of Realty,* 50 B. L. REV. 24, 55 (1970); Note, *Landlord and Tenant—Mitigation of Damages—Landlord Must Plead and Prove Actual Efforts to Relet in Order to Recover Rent for the Balance of the Term of a Wrongfully Abandoning Tenant,* 45 WASH. L. REV. 218 (1970) [hereinafter cited as *Landlord Must Plead*]; Annot., 21 A.L.R.3d 534, 540, 565 (1968); 49 AM. JUR. 2d *Landlord and Tenant* § 622 (1970).

24. *E.g.,* Benson v. Iowa Bake-Rite Co., 207 Iowa 410, 221 N.W. 464 (1928); Lawson v. Callaway, 131 Kan. 789, 293 P. 503 (1930); Parkwood Realty Co. v. Marcano, 77 Misc. 2d 690, 353 N.Y.S.2d 623 (Civ. Ct. 1974); Wright v. Baumann, 239 Or. 410, 398 P.2d 119 (1965); Strauss v. Turck, 197 Wis. 586, 222 N.W. 811 (1929). For an extreme view, see Vawter v. McKissick, 159 N.W.2d 538 (Iowa 1968), where the court held that a landlord must plead and prove efforts to relet or be barred from recovery. This case is criticized in *Landlord Must Plead, supra* note 23. A few states have imposed the duty to mitigate by statute. ALASKA STAT. § 34.03.230 (Supp. 1975); ARIZ. REV. STAT. § 33-1370 (1974); MD. REAL PROP. CODE ANN. § 8-207 (1974); WASH. REV. CODE ANN. § 59.18.310 (Supp. 1975) (all of the above apply only to residential leases); WIS. STAT. ANN. § 704.29 (Supp. 1977).

25. Marmont v. Axe, 135 Kan. 368, 370, 10 P.2d 826, 827 (1932).

26. Parkwood Realty Co. v. Marcano, 77 Misc. 2d 690, 693, 353 N.Y.S.2d 623, 626 (Civ. Ct. 1974).

27. Roberts v. Watson, 196 Iowa 816, 820, 195 N.W. 211, 213 (1923). *See* Annot., 21 A.L.R.3d 534, 575-77 (1968).

ous conditions and mutual obligations.[28] Modern leases frequently involve residential and commercial buildings and the negotiations center on the terms of the agreement instead of land.[29] Today most tenants are interested in securing an adequate place to live or to conduct business rather than the land per se.[30]

However, even though the lease itself was evolving, landlord-tenant law became relatively settled, and many of the developing contract concepts that are prominent today were not applied to leases.[31] In the face of this situation, the courts began to respond to social pressures[32] by applying contractual theories to leases in order to achieve equitable results where the established property oriented rules were deficient. The fact that many situations now exist in which contract principles are applied to leases[33] has led many courts and commentators to conclude that the contract principles which preclude recovery for harm that could reasonably have been avoided also should be applied in leasehold cases.[34] It is felt a requirement that the landlord mitigate damages would impose no greater burden than that on the promisee under an ordinary contract.[35]

The "duty to mitigate" achieves the desirable social policy of discouraging waste and preventing unjust benefit to one who passively allows damages to accrue.[36] Because the landlord is in a superior position

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28. Sommer v. Kridel, 378 A.2d 767 (N.J. 1977); Lefrak v. Lambert, 89 Misc. 2d 197, 390 N.Y.S.2d 959 (Civ. Ct. 1976); Wright v. Baumann, 239 Or. 410, 398 P.2d 119 (1965); 2 R. POWELL, *supra* note 12, at 180-81; *Landlord Must Plead, supra* note 23. *Cf.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970) (implied warranty of habitability); King v. Moorehead, 495 S.W.2d 65 (Mo. App., D.K.C. 1973) (implied warranty of habitability).

29. 2 R. POWELL, *supra* note 12, at 180-81; Bennett, *supra* note 17 at 47-48.

30. Love, *supra* note 11 provides an excellent discussion of the rationale underlying the trend in this country to treat leases as contracts.

31. 3 S. WILLISTON, *supra* note 12, § 890. See Siegel, *supra* note 17, for a well documented argument that current landlord-tenant law is modern, commercial, and already grounded in contract doctrine.

32. For a discussion of the existence of social pressures and their significance in regard to judicial decisions in this area, see Love, *supra* note 11, at 22-31.

33. *See* text accompanying notes 60-69 *infra.*

34. Sommer v. Kridel, 378 A.2d 767 (N.J. 1977); *Contract Principles and Leases of Realty, supra* note 23; Note, *Duty of the Landlord in Ohio to Mitigate Damages by Reletting After Abandonment of Leased Premises by Lessee,* 21 U. CINN. L. REV. 53, 55 (1952) [hereinafter cited as *Landlord's Obligation*].

35. Wright v. Baumann, 239 Or. 410, 398 P.2d 119 (1965); Hicks, *supra* note 4, at 518; *Landlord's Obligation, supra* note 34, at 55.

36. Legal rules and doctrines are designed not only to prevent and repair individual loss and injustice, but to protect and conserve the economic welfare and prosperity of the whole community. Consequently, it is important that the rules for awarding damages should be such as to discourage even persons against whom wrongs

to insure that the property is promptly occupied,[37] encouraging him to relet will assist in deterring the vandalism, deterioration, fire hazards, and economic stagnation that are usually associated with premises that remain vacant.[38] The minority rule also furthers the modern policy of discouraging restraints on alienation because it encourages the landlord to accept suitable subtenants.[39] Changing social conditions such as housing shortages, low vacancy rates, and the use of standard form leases which preclude negotiation of terms requiring mitigation are said to be factors dictating a change in the law.[40]

The courts of Missouri have modified traditional landlord-tenant law by applying contract principles to leases in some areas,[41] but the Missouri position on the mitigation issue is unclear. The Missouri rule concerning commercial leases is said to be that when a tenant abandons leased property the landlord may "remain out of possession, treat the term as subsisting, and recover rent."[42] However, there have been cases

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have been committed from passively suffering economic loss which could be averted by reasonable efforts. . . .

C. McCORMICK, *supra* note 9, § 33 at 127. *See* McCormick, *supra* note 10, at 218-19; Comment, *supra* note 21, at 552.

37. Love, *supra* note 11, at 100. This is particularly true in Missouri, which has a statute requiring a tenant for a term of two years or less to acquire written consent of the landlord in order to sublease or assign his interest. § 441.030, RSMo 1969.

38. *Landlord's Obligation, supra* note 34; *Landlord Must Plead, supra* note 23. *See* Martin v. Siegley, 123 Wash. 683, 212 P. 1057 (1923).

39. Comment, *supra* note 21, at 533.

40. King v. Moorehead, 495 S.W.2d 65 (Mo. App., D.K.C. 1973) (housing shortages); Parkwood Realty Co. v. Marcano, 77 Misc. 2d 690, 353 N.Y.S.2d 623 (Civ. Ct. 1974) (low vacancy rates); Comment, *supra* note 21, at 540 (standard form leases). *See* Note, *Current Interest Areas of Landlord-Tenant Law in Iowa,* 22 DRAKE L. REV. 376 (1973). One commentator has urged the courts to alter the judicially created no mitigation rule because the people suffering from the economic hardships it imposes should not have to wait for the legislature to act. *Contract Principles and Leases of Realty, supra* note 23, at 56. *Accord,* Lefrak v. Lambert, 89 Misc. 2d 197, 30 N.Y.S.2d 959 (Civ. Ct. 1976). *But see Trends in Landlord-Tenant Law Including Model Code,* 6 REAL PROP., PROB. & TR. J. 550, 588 (1971) [hereinafter cited as *Trends*] (urges judicial self-restraint).

41. *See* text accompanying notes 61-69 *infra.*

42. Babcock v. Rieger, 76 S.W.2d 731, 735 (D.C. Mo. App. 1934). This case states that the landlord also has the option to "[g]ive notice to tenant, resume possession and relet to mitigate damages, collecting loss from tenant" or "[r]eenter, resume possession in own right and close term. If no notice is given and landlord resumes possession, he is deemed to be doing so to terminate lease." *Id.* at 735.

On their face these rules permit reentry but do not require it. However, when the landlord does reenter without accepting the tenant's surrender then he must use reasonable efforts to mitigate damages. Consolidated Sun Ray, Inc. v. Oppenstein, 335 F.2d 801 (8th Cir. 1964); Crow v. Kaupp, 50 S.W.2d 995 (Mo. 1932). *See* Von Schleinitz v. North Hotel Co., 323 Mo. 1110, 23 S.W.2d 64 (1929); 1 AMERICAN LAW OF PROPERTY § 3.99 (A.J. Casner ed. 1952); Hicks, *supra*

in which the courts have said that, where the lease permitted rerenting by the landlord upon the tenant's abandonment, it "was his [the landlord's] duty, under both the lease and the law, to relet the premises for the benefit of the lessee in order to minimize the damages."[43] This statement of the Missouri Supreme Court later was characterized as dictum by a lower court.[44]

Although the majority rule often has been referred to in the opinions,[45] when Missouri courts have been confronted with the question of the landlord's duty to mitigate, the decisions have been based on other grounds.[46] Nevertheless, the courts' consistent statement of the rule[47] and the dicta indicating that the decisions would have been based on this rule had other grounds not been available[48] lend support to the inference that the commercial landlord is under no duty to mitigate damages in Missouri. Similarly, there are cases in which the abandoning tenant has been held liable for back rent with no inquiry into the question whether the landlord attempted to mitigate, which indicates that the

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note 4, at 420; Annot., 21 A.L.R.3d 534, 561-63 (1968); RESTATEMENT (SECOND) OF PROPERTY § 11.1, Comment i at 12 (Tent. Draft No. 3 1975).

43. Crow v. Kaupp, 50 S.W.2d 995, 998 (Mo. 1932). This rule was restated and followed in Knapp v. Strauss, 227 Mo. App. 822, 832, 58 S.W.2d 805, 810 (K.C. Ct. App. 1933), but characterized as dicta in Whitehorn v. Dickerson, 419 S.W.2d 713, 718 (Spr. Mo. App. 1967). See 49 AM. JUR. 2d *Landlord and Tenant* § 622 (1970), citing *Crow* for the proposition that the presence of a reentry clause gives rise to the duty of a landlord to mitigate.

44. Whitehorn v. Dickerson, 419 S.W.2d 713 (Spr. Mo. App. 1967).

45. Consolidated Sun Ray, Inc. v. Oppenstein, 335 F.2d 801, 810 (8th Cir. 1964) (applying Missouri law); Rhoden Inv. Co. v. Sears, Roebuck & Co., 499 S.W.2d 375, 386 (Mo. 1973); Babcock v. Rieger, 76 S.W.2d 731, 735 (K.C. Mo. App. 1934); Jennings v. First Nat'l Bank, 225 Mo. App. 232, 30 S.W.2d 1049 (K.C. Ct. App. 1930). For Missouri cases dealing with what constitutes abandonment, see Northwest Mo. State Fair, Inc. v. Linville, 448 S.W.2d 274 (K.C. Mo. App. 1969); Jackson v. Merz, 223 S.W.2d 136 (St. L. Mo. App. 1949); Mullaney v. McReynolds, 170 Mo. App. 406, 155 S.W. 485 (Spr. Ct. App. 1913).

46. *See* Consolidated Sun Ray, Inc. v. Oppenstein, 335 F.2d 801 (8th Cir. 1964) (applying Missouri law) (evidence not clear as to course of action landlord elected); Rhoden Inv. Co. v. Sears, Roebuck & Co., 499 S.W.2d 375 (Mo. 1973) (lease did not provide for mitigation, and defendant could not withhold rent for demised premises simply because lessor did not rerent building available at no extra charge to lessee); Hurwitz v. Kohm, 516 S.W.2d 33 (Mo. App., D. St. L. 1974) (lessee failed to properly answer lessor's motion for summary judgment); Whitehorn v. Dickerson, 419 S.W.2d 713 (Spr. Mo. App. 1967) (not clear from record of trial as to whether defendant showed breach of duty to mitigate or how damages should be reduced).

47. *See* note 42 *supra;* cases cited note 45 *supra.*

48. Consolidated Sun Ray, Inc. v. Oppenstein, 335 F.2d 801 (8th Cir. 1964) (recognizes rule but finds evidence insufficient to bring case under it); Rhoden Inv. Co. v. Sears, Roebuck & Co., 499 S.W. 2d 375 (Mo. 1973) (court refers to cases stating rule as "authorities"); Hurwitz v. Kohm, 516 S.W.2d 33 (Mo. App., D. St. L. 1974) (for purposes of summary judgment lessor not required as a matter of law to mitigate).

courts do not require it.[49] However, since neither the parties nor the courts expressly raised the issue of the obligation to mitigate in these cases, they are not dispositive of the issue.

The assumption that Missouri adheres to the majority rule is buttressed by the fact that a landlord attempting to mitigate damages when his property is abandoned runs the risk of having his efforts interpreted as an acceptance of the tenant's surrender of the premises resulting in the tenant being released from future liability under the lease.[50] This danger is illustrated in *Zoglin v. Layland*,[51] where an abandoning tenant and his guarantor were released from liability when lessors reentered, renovated, operated, and listed the demised business with two renting agents. The lessors claimed they took possession in an effort to mitigate damages, but the court found that reentry terminated the lease because the lessors had not adequately notified the lessee that they were acting on his behalf.[52]

Although it is apparent that Missouri courts have recognized the majority rule, they have not discussed its basis or rationale. The courts have merely stated that it is the majority rule and cited to prior Missouri cases which have stated the rule without analyzing it. Often these supporting cases did not deal with the issue of mitigation of damages but only set forth the rule in a discussion of general landlord-tenant law in

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49. Durbin-Durco, Inc. v. Blades Mfg. Corp., 455 S.W.2d 449 (Mo. 1970) (lessee held liable when he abandoned the leasehold and lessor allowed it to remain vacant for 22 months, under a clause in the lease which stated that lessee would be obligated to pay rent even if it forfeited the lease and landlord took possession); National Alfalfa Dehyd. & Milling Co. v. 4010 Washington, Inc., 434 S.W.2d 757 (K.C. Mo. App. 1968) (abandoning tenant held liable for rent due up to time landlord relet because tenant did not properly notify landlord as provided in the lease); Babcock v. Rieger, 76 S.W.2d 731 (K.C. Mo. App. 1934). (The court indicated it was holding tenant liable under the rule that the landlord was under no duty to mitigate, but the issue was whether the landlord had accepted tenant's surrender and neither party raised the issue of mitigation).

50. For a discussion of how this problem may be alleviated see text accompanying notes 82-89 *infra*. For Missouri cases in which surrender and acceptance are discussed, see Crow v. Kaupp, 50 S.W.2d 995 (Mo. 1932); Zoglin v. Layland, 328 S.W.2d 718 (K.C. Mo. App. 1959); Thomas v. Roth, 157 S.W.2d 250 (St. L. Mo. App. 1942); Babcock v. Reiger, 76 S.W.2d 731 (K.C. Mo. App. 1934). *See generally* Hicks, *supra* note 4, at 520; McCormick, *supra* note 10 at 212-16; *Landlord Must Plead, supra* note 23, at 226. In *Landlord Must Plead* the author advocates that courts should presume the landlord to be acting on behalf of the tenant in order to encourage mitigation and relieve the landlord of fear of loss. *Crow* is an example of this presumption. McCormick predicts that this rule will disappear and be replaced by fairer contract principles. McCormick, *supra* note 10 at 222.

51. 328 S.W.2d 718 (K.C. Mo. App. 1959).

52. *Id.*

Missouri.[53] Some decisions have recognized this weakness and indicated doubt as to the status of the law in Missouri.[54]

There is a more substantial question in Missouri regarding the landlord's duty to mitigate damages under a residential lease. With one exception,[55] the Missouri cases recognizing the "no duty to mitigate" rule make no distinction between residential and commercial leases, although all of these cases have involved commercial leases. Only one Missouri case has directly spoken to the issue of the *residential* landlord's duty to mitigate. In *In re Estate of Church*[56] the deceased lessee's estate was held liable under a residential lease, but because the state asserted that the landlord failed to mitigate damages the court remanded the case for an evidentiary hearing on the damages issue. This indicates that the court accepted the mitigation argument and is significant because it is the only residential lease case where the issue has been litigated. Thus, the dearth of decisions concerning residential leases and the lack of strong precedent in the area of commercial leases leaves the status of a landlord's duty to mitigate open to speculation.

The modern trend and tendency of the Missouri courts is increasingly to apply existing contract principles to landlord-tenant controversies.[57] A recent Missouri case fueled this movement by "adopt[ing] the view that a lease is not only a conveyance but also gives rise to a contractual relationship between the landlord and tenant."[58] The court futher pointed out that the old property rules were "never intended to apply to residential urban leaseholds" and that "[c]ontract principles established in other areas of the law provide a more rational framework for the apportionment of landlord-tenant responsibilities."[59]

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53. Whitehorn v. Dickerson, 419 S.W.2d 713 (Spr. Mo. App. 1967). The court pointed out that Jennings v. First Nat'l Bank, 225 Mo. App. 232, 30 S.W.2d 1049 (K.C. Ct. App. 1930) and Von Schleinitz v. North Hotel Co., 323 Mo. 1110, 23 S.W.2d 64 (1929) do not support the conclusion that a landlord is under no duty to mitigate, because neither case dealt with that issue. It is also clear that other Missouri cases do not necessarily stand for the "no duty to mitigate" rule. *See* cases cited note 46 *supra.*

54. Hurwitz v. Kohm, 516 S.W.2d 33, 37 (Mo. App., D. St. L. 1974) (court used equivocal phrases when discussing Missouri's position); Whitehorn v. Dickerson, 419 S.W.2d 713, 718 (Spr. Mo. App. 1967) (search for a controlling Missouri case unproductive and inconclusive).

55. Hurwitz v. Kohm, 516 S.W.2d 33 (Mo. App., D. St. L. 1974). "[U]nder the existing law of the State of Missouri, it is at least recognized that a lessor is under no duty to seek a new tenant when the lessee abandons the leased premises prior to the expiration of the term of a *commercial* lease. . . ." *Id.* at 37 (emphasis added).

56. 504 S.W.2d 214 (Mo. App., D. St. L. 1973).

57. *See* text accompanying notes 61-69 *infra.*

58. King v. Moorehead, 495 S.W.2d 65, 75 (Mo. App., D.K.C. 1973).

59. *Id.* at 73.

This rationale is supported by Missouri decisions which have opted to apply contractual principles to leases. Missouri courts have explicitly recognized that leases are contracts,[60] and have found leases to contain implied *dependent* covenants.[61] Missouri courts have applied the following contract theories to leases: anticipatory repudiation,[62] illegality,[63] frustration of purpose,[64] the parol evidence rule,[65] the whole consideration exception to the independent covenant rule,[66] and the doctrine of mutuality.[67] The same rules of construction that are used to interpret contract language are used to interpret language in leases.[68]

It should be noted that for all contracts except leases Missouri has adopted the accepted principle that a party must mitigate damages resulting from a breached contract or be denied recovery for the loss he could have avoided with reasonable effort.[69] This state also has adopted the Uniform Commercial Code which contains provisions reflecting a policy of encouraging the mitigation of damages.[70] For decades Missouri and other states have applied the standard of reasonableness to a party's effort to mitigate losses under a breached contract.[71]

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60. Thomas v. Roth, 157 S.W.2d 250 (St. L. Mo. App. 1942); Marden v. Radford, 229 Mo. App. 789, 84 S.W.2d 947 (K.C. Ct. App. 1935).

61. For cases recognizing an implied covenant of quiet enjoyment in Missouri, see Best v. Crown Drug Co., 154 F.2d 736 (8th Cir. 1946); Johnson v. Missouri-K.-T. R.R., 216 S.W.2d 499 (Mo. 1949). For a discussion of the implied warranty of habitability in Missouri, see King v. Moorehead, 495 S.W.2d 65 (Mo. App., D.K.C. 1973); Gross, *Landlord-Tenant: Implied Warranty of Habitability in Leases,* 39 Mo. L. Rev. 56 (1974).

62. Hawkinson v. Johnston, 122 F.2d 724 (8th Cir.), *cert. denied,* 314 U.S. 694 (1941); National Alfalfa Dehyd. & Milling Co. v. 4010 Washington, Inc., 434 S.W.2d 757 (K.C. Mo. App. 1968) (accepts Hawkinson v. Johnston). *See generally* Hicks, *supra* note 4, at 522.

63. Rock Springs Realty, Inc. v. Waid, 392 S.W.2d 270 (Mo. 1965) (court considered whether clause in lease is against public policy); Twiehaus v. Rosner, 362 Mo. 949, 245 S.W.2d 107 (1952); Winters v. Cherry, 78 Mo. 344 (1883) (month to month tenancy).

64. Crow Lumber & Bldg. Materials Co. v. Washington County Library Bd., 428 S.W.2d 758 (St. L. Mo. App. 1968); *discussed in* Hicks, *supra* note 4, at 534.

65. McDaniel v. Willer, 216 S.W.2d 144 (St. L. Mo. App. 1948).

66. Hiatt Inv. Co. v. Buehler, 225 Mo. App. 151, 16 S.W.2d 219 (K.C. Ct. App. 1929) (tenant had right to terminate lease and refuse to perform where landlord breached covenant that was essential to purpose of lease). *Discussed in* Hicks, *supra* note 4, at 454-64; Love, *supra* note 11, at 94.

67. P.R.T. Inv. Corp. v. Ranft, 363 Mo. 522, 252 S.W.2d 315 (1952); Reid v. Gees, 277 Mo. 556, 210 S.W. 878 (1919); Blake v. Shower, 207 S.W.2d 775 (St. L. Mo. App. 1948).

68. Polk v. Mitchell, 225 Mo. App. 145, 15 S.W.2d 961 (K.C. Ct. App. 1928).

69. Haysler v. Owen, 61 Mo. 270 (1875); Lokey v. Rudy-Patrick Seed Co., 285 S.W. 1028 (K.C. Mo. App. 1926); Sentney Wholesale Grocery Co. v. Thompson, 216 S.W. 780 (Spr. Mo. App. 1919). *See* J. Calamari & J. Perillo, The Law of Contracts §§ 202-236 (1970); 5 A. Corbin, Corbin on Contracts § 1039 (1964); Restatement of Contracts § 336 (1932).

70. §§ 400.2-704,-706,-709,-711,-712,-715, RSMo 1969.

71. *See* cases cited note 69 *supra.*

This same standard of reasonableness is applied to the landlord's efforts to relet abandoned premises in states which require the landlord to act,[72] and, as is true with contract law, equitable results have been achieved for all parties.[73] The landlord has no duty to mitigate until he receives notice or reasonably should have known of the abandonment.[74] He can collect for his honest and reasonable efforts to relet regardless of whether he is successful.[75] There is no set formula for determining reasonableness; each case must be determined on its particular facts.[76] However, the landlord has not been required to accept tenants that are credit risks,[77] to violate the terms of the existing lease,[78] to shift present tenants,[79] or to alter the premises.[80] In addition, failure to mitigate is not a bar to the landlord's cause of action but only prevents recovery for those damages he could reasonably avoid.[81]

Upon the tenant's abandonment of the premises, the landlord has a legitimate concern that his efforts to mitigate might be interpreted as an acceptance of the tenant's surrender of the premises and that the tenant thereby will be absolved of all obligations under the lease. In order to protect himself the Missouri landlord need only give notice to the tenant that he is acting on the tenant's behalf to minimize damages and is not relinquishing his claim to the rent.[82] This notice must be given prior to

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72. *See* notes 24-27 and accompanying text *supra.*

73. Hicks, *supra* note 4; *Contract Principles and Leases of Realty, supra* note 23, at 55; *Landlord Must Plead, supra* note 23, at 225.

74. Friedman v. Colonial Oil Co., 236 Iowa 140, 18 N.W.2d 196 (1945).

75. Myers v. Western Farmers Ass'n, 75 Wash. 2d 133, 449 P.2d 104 (1969); Hicks, *supra* note 4; *Trends, supra* note 40, at 585 (the article states that the Uniform Residential Landlord and Tenant Act stands for this proposition). This policy is consistent with RESTATEMENT OF CONTRACTS § 336(2) (1932).

76. Friedman v. Colonial Oil Co., 236 Iowa 140, 18 N.W.2d 196 (1945); Parkwood Realty Co. v. Marcano, 77 Misc. 2d 690, 353 N.Y.S.2d 623 (Civ. Ct. 1974). The jurisdictions are divided as to who must prove mitigation or the lack of it. *Landlord Must Plead, supra* note 23, at 227-28. *See* Annot., 21 A.L.R.3d 534, 577-79 (1968).

77. Reget v. Dempsey-Tegler & Co., 70 Ill. App.2d 32, 216 N.E.2d 500 (1966), *aff'd,* 96 Ill. App. 2d 278, 238 N.E.2d 418 (1968).

78. Carpenter v. Wisniewski, 139 Ind. App. 325, 215 N.E.2d 882 (1966).

79. Reich v. McCrea, 13 N.Y.S. 650 (1891).

80. Woodbury v. Sparrell, 198 Mass. 1, 84 N.E. 441 (1908).

81. Whitehorn v. Dickerson, 419 S.W.2d 713 (Spr. Mo. App. 1967).

82. If the tenant abandons the premises and the landlord re-enters and relets them, the reletting by him is presumed to be for his own benefit, and a surrender by operation of law results. But, if the landlord notifies the tenant that such reletting is for the latter's benefit, there will be no surrender.

Crow v. Kaupp, 50 S.W.2d 995, 998 (Mo. 1932). *See* Blond v. Hoffman, 343 Mo. 247, 121 S.W.2d 137 (En Banc 1938); Von Schleinitz v. North Hotel Co., 323 Mo. 1110, 23 S.W.2d 64 (1929); Zoglin v. Layland, 328 S.W.2d 718 (K.C. Mo. App. 1959).

the reletting by the landlord[83] and its sufficiency generally is determined on the facts of each case.[84] It appears that the notice may be given by word or act,[85] and may be given to an agent of the lessee.[86] It has been held that notice to the lessee's guarantor is not sufficient.[87] There is language indicating that the notice requirement will be waived where the lessor can demonstrate that it was impossible to give the tenant notice.[88] It also has been held that if the lessee consents, e.g., in a provision of the lease, the landlord may resume possession and relet for the lessee's benefit without giving notice to the lessee.[89]

In light of the lack of authority in Missouri on the landlord's duty to mitigate under residential leases, and weakness of authority concerning commercial leases, the necessity for clarification of Missouri's position is obvious. There are few obstacles to adopting the requirement that a landlord make reasonable efforts to reduce damages, particularly in regard to residential leases. Changing social conditions, the tendency of Missouri courts to recognize the contractual nature of leases, and the public policy against waste coupled with the readily formulated contract principles available, all weigh heavily in favor of adopting this rule.[90]

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83. Von Schleinitz v. North Hotel Co., 323 Mo. 1110, 1133, 23 S.W.2d 64, 75 (1929). This case provides a lengthy discussion of surrender, acceptance, and notice, using many helpful examples.

84. Some factors to be considered are: Whether the landlord resumed beneficial use and enjoyment of the property, whether the circumstances are such that it would be fair to assume that the lessor does not intend to look to the tenant for future rent, whether actual notice was given, whether the landlord acted as owner of the premises, whether the landlord took possession unqualifiedly, whether the landlord protested the abandonment, and whether there was an opportunity to give notice. *Id.*

85. *Id.* at 1133, 23 S.W.2d at 75.

86. *Id.* The language here indicates that had lessor protested to lessee's agent against resuming possession of the premises or notified the agent that the action was on lessee's behalf the court would have found for the lessor.

87. Zoglin v. Layland, 328 S.W.2d 718, 723-24 (K.C. Mo. App. 1959).

88. *Id.* at 723. *See* 66 C.J.S. *Notice* § 14 (1950). "The giving of a notice may be excused where it appears that it was impossible to give it or that the giving of it would avail nothing and serve no useful purpose." However, it has been held that obligations to give notice that are assumed voluntarily as a part of a contract are not excused by inability to serve notice. *Id.*

89. Crow v. Kaupp, 50 S.W.2d 995 (Mo. 1932). It appears that under leases which allow re-entry but do not mention reletting the notice requirement remains in effect. *See* Zoglin v. Layland, 328 S.W.2d 718 (K.C. Mo. App. 1959) (the lease provided that upon tenant's default lessor could re-enter and take possession, yet the lessor was found to have accepted the lessee's surrender on the ground, *inter alia,* that he did not notify lessee that he was acting on lessee's behalf.

90. Other persuasive factors are the incorporation of the mitigation requirement into the Uniform Residential Landlord and Tenant Act, and the favorable reception the rule has received from the commentators. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.203(c).