



Ch-Ch-Ch-Changes: NY Commercial Landlords' Duty to Mitigate



By **Steven M. Herman**
Partner | Real Estate



By **Parker Ihrie**
Associate | Real Estate

The fluidity of New York's legal landscape continues to accelerate in the wake of the pandemic. Proposed legislation in New York may disrupt long-established law that commercial landlords do not have a duty to mitigate their damages when a tenant vacates its premises in violation of the terms of its lease.

When a tenant vacates its premises in violation of its lease, a landlord suffers damages such as lost rents through the remainder of the lease term and expenses of re-letting. The extent of those damages depends on the amount of effort that a landlord expends in finding a new tenant. If a landlord is slow to take steps to re-let the premises, or "mitigate its damages," it takes longer to find a new tenant. The longer it takes to find a new tenant, the higher the damages accrue. If a landlord takes no mitigation action at all, its damages pile up throughout the remainder of the lease term.

Since 1995, New York commercial landlords have been free of any duty to mitigate their damages when a tenant vacates its premises prior to the end of the stated term of the lease. *Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.*, a 1995 New York Court of appeals decision, definitively held that since a lease is a present transfer of an estate in real property and not an executory contract, leases are not subject to the general rule that upon a breach of contract, the injured party must make reasonable "exertions to minimize the injury." To the contrary, the case specifically holds that the landlord is free to sit back and sue to collect its rent without any duty to mitigate its damages. However, pursuant to NY Real Prop § 227-e, a residential landlord has a statutory obligation to mitigate its damages when a tenant vacates a premises in violation of its lease. Section 227-e explicitly applies to leases covering dwellings only, thereby carving out commercial leases. On January 7, 2021, Senate Bill 1129 was introduced which would amend Section 227-e to delete that carve-out, bringing commercial leases within its scope.

New York landlords may soon be unable to sit idly by waiting for the violated lease term to expire, incurring more damages each month and collecting those damages

from their existing tenant. Landlords would be required to spring into action, find a broker and otherwise take reasonable and customary steps to lease their space. While it is important to note that this is the fourth time that this legislative amendment has been proposed since August 2019, it is certainly fair to say that the times – they are a changin’.

We will keep you apprised of any further developments of this proposed legislation.