



New York Legislature Considers Imposing Duty to Mitigate Damages in Commercial Leases: A Potential Fundamental Shift in Landlord Remedies

Introduction

Pending legislation in the New York State Legislature (Assembly Bill 2611 and Senate Bill 421), if enacted, would impose a statutory duty on commercial landlords to mitigate damages when a tenant vacates the premises in violation of a lease.

Overview of Proposed Legislation

The proposed bill, which would amend Section 227-e of the New York Real Property Law, would require a commercial landlord to “take reasonable and customary actions” to rent the premises when a tenant wrongfully vacates the premises before the expiration date of a lease. Under the bill, the landlord must attempt to rent the premises “at fair market value or at the rate agreed to during the term of the tenancy.” Once in effect, the new lease terminates the prior tenant’s lease and mitigates damages otherwise recoverable against the prior tenant. The burden of proof would be on the party seeking to recover damages. The bill would void any lease provision waiving that obligation as against public policy.

The bill does not, however, preclude the landlord from seeking recovery of damages for that portion of rent not recovered through any successful effort to mitigate damages.

At the close of session on Friday, June 5th, a version of the bill passed the New York State Assembly but did not advance in the Senate.

Departure from Existing Law

Current New York Rule

Pursuant to Section 227-e of the New York Real Property Law, a residential landlord has a statutory obligation to mitigate its damages when a tenant vacates a premises in violation of its lease. Currently, Section 227-e does not apply to commercial leases. Under current law in New York State, when a tenant to a commercial lease vacates its premises in violation of the lease, the landlord is free to sit back and sue to collect its rent without any duty to mitigate its damages.

Proposed Shift

The legislation represents a clear departure from that framework by:

- Imposing an affirmative duty to mitigate damages.
- Invalidating contractual provisions that disclaim mitigation.
- Limiting recoverable damages to actual economic loss after reasonable re-letting efforts.

If enacted, this would align commercial leasing more closely with residential landlord-tenant principles. Notably, the bill contains no express grandfathering provision and states that it would take effect immediately, creating uncertainty as to whether it would apply to existing leases which explicitly provide that Landlord has no duty to mitigate damages; however, given its public policy framing, it is likely to affect future defaults under existing leases.

Conclusion

If enacted, the proposed mitigation requirement would represent one of the most significant shifts in New York commercial leasing law in decades. The legislation would materially impact lease drafting, landlord remedies, guaranty structures, and recovery expectations in commercial real estate transactions.

According to Catherine Fee of Empire Government Strategies (EGS), it is very unlikely there will be any future movement in the bill this year; however, the bill continues to have support.

RMF and EGS will continue to track developments and provide updates on this bill.

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