

Daily Development for Thursday, September 16, 2010

by: Patrick A. Randolph, Jr.

Elmer F. Pierson Professor of Law

UMKC School of Law

Of Counsel: Husch Blackwell Sanders

Kansas City, Missouri

dirt@umkc.edu

LANDLORD/TENANT; SURRENDER: The mere taking of keys to leased premises by a landlord does not give to an inference that the landlord has accepted surrender of the premises.

Sirdah v. North Springs Associates, LLLP, 2010 WL 2278184 (Ga.App 6/8/10.)

Even though Georgia law generally obligates an injured party to mitigate damages, this general rule to mitigate damages does not apply to lease contracts. In Georgia, the rule is: "if a tenant abandons leased premises without authorization prior to the expiration of the term, the landlord is not required to mitigate damages by reletting the premises. Rather, he may allow the premises to remain vacant and hold the tenant responsible for accruing rent."

There are two limited exceptions to this general rule: "[I]f the landlord accepts the tenant's surrender or the tenant successfully terminates the lease, the landlord is required to make reasonable efforts to re-lease the premises and mitigate his damages." In this case before the Georgia Court of Appeals, it was undisputed that the tenant did not successfully terminate the lease.

Here, the tenant wrote to its landlord that it "would no longer be open for business." In that same letter the tenant returned the keys and specifically wrote: "I am turning in my keys to the premises." In response, the landlord, by certified letter, notified the tenant as follows: "be advised that although [the tenant] has given up possession of the premises through return of his key, [the landlord] has accepted same without terminating the Leases. The landlord [intends to hold the tenant] liable for all sums due and owing through the expiration of the term of the Leases, together with any damages to the premises, to be reduced only by sums received by [the landlord] through re-letting of said premises."

The Court rejected the tenant's assertion that he had "given up possession of the premises through his return of his key" and that the landlord "accepted same." In essence, the tenant argued that the landlord was then required to "have made reasonable efforts to re-let the premises."

The Court was unpersuaded. "The mere taking of the keys to the leased premises by a landlord does not give rise to an inference that the landlord accepted surrender of the premises. ... Likewise, [t]he mere entry upon the premises to protect the property after abandonment by the lessee will not amount to an acceptance of a surrender of a lease." In addition to looking at the subjective intent of the landlord, the Court pointed to the landlord's response letter wherein it expressly said that it was not terminating the leases. Fundamentally, to the Court, there was uncontradicted evidence that the landlord neither expressly nor impliedly accepted the tenant's surrender of the leased premises.

To reinforce its reasoning, the Court pointed to a Bankruptcy Court decision in the Southern District of Georgia which recited: "surrender differs from abandonment, as applied to leased premises, inasmuch as

the latter is simply an act on the part of the lessee alone; but to show a surrender, a mutual agreement between a lessor and a lessee that the lease is terminated must be clearly proved."

Comment 1: The Georgia court emphasized that there is no duty to mitigate in that state, and that this contributes to its conclusion that simply returning the keys does not contribute to a surrender. Georgia, by the way, is one of fifteen states that recognize no commercial duty to mitigate. It is in company with New York, Pennsylvania, Missouri, and nine others, all listed in the appendix to Chapter 16 of the Randolph Edition of Friedman on Leasing.

But it should be noted that the same conclusion reached here might also be relevant in a mitigation state. Even under the mitigation rule, the landlord still can collect rent from the defaulting tenant when the landlord's reasonable efforts to mitigate do not replace the defaulted rent for the balance of the term. A surrender, however, would mean that the lease was at an end, and therefore the landlord could not look to the defaulting tenant for those missing rents. Thus, the rule that simply giving the keys to the landlord is not, without more, a surrender, is relevant in mitigation states as well.

Comment 2: The rule here is consistent with other authorities elsewhere, as delineated in note 145 to Chapter 16 in the Randolph edition of Friedman and in an ALR annotation at 84 ALR 4th 183 (1991).

**Items reported here and in the ABA publications
are for general information purposes only and
should not be relied upon in the course of
representation or in the forming of decisions in
legal matters. The same is true of all
commentary provided by contributors to the DIRT
list. Accuracy of data and opinions expressed
are the sole responsibility of the DIRT editor or
individual contributors and are in no sense the
publication of the ABA.**

**Parties posting messages to DIRT are posting to a
source that is readily accessible by members of
the general public, and should take that fact
into account in evaluating confidentiality
issues.**

ABOUT DIRT:

DIRT is an internet discussion group for serious

real estate professionals. Message volume varies,
but commonly runs 5 to 15 messages per work day.

DIRT Developments are posted periodically, as supply dictates.

To subscribe, send the message

subscribe Dirt [your name]

to

listserv@listserv.umkc.edu

To cancel your subscription, send the message

signoff DIRT to the address:

listserv@listserv.umkc.edu

for information on other commands, send the message

Help to the listserv address.

DIRT has an alternate, more extensive coverage that includes not only commercial and general real estate matters but also focuses specifically upon residential real estate matters. Because real estate brokers generally find this service more valuable, it is named "BrokerDIRT." But residential specialist attorneys, title insurers, lenders and others interested in the residential market will want to subscribe to this alternative list. If you subscribe to BrokerDIRT, it is not necessary also to subscribe to DIRT, as BrokerDIRT carries all DIRT traffic in addition to the residential discussions.

To subscribe to BrokerDIRT, send the message

subscribe BrokerDIRT [your name]

to

listserv@listserv.umkc.edu

To cancel your subscription to BrokerDIRT, send the message

signoff BrokerDIRT to the address:

listserv@listserv.umkc.edu

DIRT is a service of the American Bar Association
Section on Real Property, Probate & Trust Law and
the University of Missouri, Kansas City, School
of Law. Daily Developments are copyrighted by
Patrick A. Randolph, Jr., Professor of Law, UMKC
School of Law, but Professor Randolph grants
permission for copying or distribution of Daily
Developments for educational purposes, including
professional continuing education, provided that
no charge is imposed for such distribution and
that appropriate credit is given to Professor
Randolph, any substitute reporters, DIRT, and its sponsors.

All DIRT Developments, and scores of other cases, arranged topically, are reported in hardcopy form in the ABA Quarterly Report. This is a limited subscription service, available to ABA Section Members, ACMA members and members of the NAR. Qualified subscribers may Subscribe to this Report (\$30 for Two Years) by Sending a Check to Ms. Bunny Lee, ABA Section on Real Property, Trust & Estate Law, 321 N. Clark Street, Chicago, IL 60610. Contact Bunny Lee at (312) 988-5651, Leeb@staff.abanet.org ABA members also can access prior and current editions of this report on the ABA RPTE section website.

DIRT has a WebPage at:

<http://dirt.umkc.edu/>

To add or remove from this mailing list, please go to <http://listserv.umkc.edu/scripts/wa.exe?SUBED1=DIRT&A=1> or send an email message to the address listserv@listserv.umkc.edu, with the text SIGNOFF DIRT in the body of the message.

You are subscribed to the DIRT list as randolphp@UMKC.EDU.
Problems or questions should be directed to manager@listserv.umkc.edu.