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When Neither Party Will Fix the Roof

Roger Bernhardt

Golden Gate University School of Law, rbernhardt@ggu.edu

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When Neither Party Will Fix the Roof

by Roger Bernhardt, * Professor of Law, Golden Gate University, San Francisco CA

The issue in *ASP Props. Group, L.P. v Fard, Inc.* (2005) 133 CA4th 1257, 35 CR3d 343 was whether a commercial tenant was bound to replace a roof entirely because the lease required it to keep the premises (including, specifically, the roof) in good and safe condition, even though the roof had already outlasted its economic life at the time the covenant was made. When the tenant refused to replace it, the landlord sought to evict him.

The California courts ruled in favor of the tenant, holding that a tenant's covenant to maintain or repair does not include an obligation to replace an old, dilapidated roof with a new roof; a tenant generally is not required to restore premises to a better condition than existed when they were let and the duty to maintain means to maintain it only in the condition that existed when the agreement was made.

That particular outcome is not surprising, given that the language of the repair clause was not that clear, there were special circumstances involved in how and why it came about, and there was enough parol evidence to make almost any construction of the clause justifiable. While the old common law rule used to be that a tenant's covenant to repair automatically included an obligation to rebuild, except when that burden was specifically excluded¹, courts have since moved so far

away from that formalistic position that today explicit drafting or exceptional circumstances would be needed to reach the same result. But that should not make tenant lawyers think that all of their clients' problems are over.

Saying that a tenant cannot be evicted for failing to replace a bad roof does not answer numerous other questions that the situation generates. The roof won't replace itself and who is going to fix it? The easy answer—the landlord has to fix—is probably as incorrect as contending that the tenant had to do so.

A hard concept to get across to law students is that saying that a tenant does not have a duty to repair is not the equivalent of saying that the landlord therefore does have that duty. Our students are so imbued with notions of duty everywhere (probably from taking too many Torts courses) that they are uncomfortable with the prospect that *neither* landlord nor tenant may owe a duty to the other, as far as certain repairs are concerned. But mutual non-duty is, indeed, the original rule regarding disrepairs in rental properties, and may still be, when the premises are commercial.² If the roof was broken at the commencement of the term, the principle of caveat emptor kept the tenant from demanding that the landlord correct it.³ And if it broke during the term, the landlord's current lack of possession eliminated imposition of any common law repair duty on him

*I wrote this comment originally for my column in the California Real Property Law Reporter. The ACREL Editors then asked me to make it less provincial, so I have added, for national authority, quotes from all of the major Property textbooks.

¹"A tenant's covenant to repair was treated at common law as a covenant to restore, and a tenant who had agreed to repair was required to restore the improvements after accidental destruction. ... The common-law rule has been abrogated by statute in case of nonnegligent damage. It was not applied to a lease of part of a building where application of the rule would require the tenant to rebuild parts of a building not included in the lease." *Friedman on Leases*, Milton R. Friedman and Patrick A. Randolph, Jr. PLI 2004 § 9:1.2.

²"When no duty to repair exists, neither party may terminate the lease for the other's failure to make a repair. Thus, at common law, a tenant could not stop paying rent because his premises were destroyed nor could his landlord terminate his estate if he refused to repair or rebuild the destroyed premises." Bernhardt & Burkhart, *Black Letter Law of Real Property*. §V(E)(d). (4th Ed, 2003, West).

³"One taking a lease of property stands in the position of a purchaser, who can and is bound to inspect the property, and is consequently subject to the rule of caveat emptor. It results that there is no implied warranty by the lessor as to the condition of the premises, and the lessee cannot ordinarily complain that they were not, at the beginning of the tenancy, in a tenantable condition, or were not adapted for the purposes for which they were leased." *Tiffany Real Property*, Herbert T. Tiffany and Basil Jones, 2005 §99

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(the landlord).⁴ The consequences of the injury were thus shared between the parties: the tenant suffered during the balance of its term and the landlord suffered thereafter. Thus, either could fix it, if either of them wanted to, but neither owed the other any duty to fix it.

As a background rule, this doctrine provides a useful setting for negotiating the parties' respective repair rights and obligations. However, in *ASP*, the landlord made no promise to fix, and the tenant's promise to maintain was held not to include any duty to replace (which was apparently the only kind of repair that would work). Thus, the default rule was left unaltered by this lease: neither side had the power to order a new roof and then demand that the other pay the roofer.

That means, *inter alia*, that a landlord cannot evict the tenant for refusing to pay for a new roof. But does it also mean that a tenant can move out if the landlord won't pay for it either? I think not. Since these are commercial premises there is probably no implied warranty of habitability nor any statutory repair-and-deduct right involved - those tenant perquisites apply to residential premises and are generally not extended to commercial premises.⁵ I suspect that just as the landlord cannot add the cost

of a new roof to the rent it collects from the tenant, the tenant cannot subtract the cost of a new roof from the rent it pays to the landlord. It is a standoff.

But the standoff is unlikely to last forever. The roof in *ASP* seemed to be leaking badly, and that could make a difference. For a tenant, a leaking roof can ruin its business activities inside the building. (Who would want to shop or work there?) But that does not mean the tenant can quit. Even when premises are untenantable, the theory of constructive eviction requires that the untenability be due to some breach by the landlord, and the tenant's problem is that there may not be any repair duty for the landlord to breach.⁶ That means that if the tenant does quit without continuing to pay the rent, it may be breaching its lease and making itself liable for damages or future rent, depending on how the jurisdiction treats abandonment before the end of the term and to what extent it requires the landlord to mitigate.⁷

Conversely, for a landlord, a leaky roof can mean that rain gets inside, warps the floors, damages the electrical system and does other permanent damage unless protective action is taken. If the tenant is still in possession, its common law duty to avoid waste⁸ means that it

⁴"Where the subject matter of the lease is improved land, as distinguished from a lease of a part of a building, the tenant, at common law, remains liable under his lease and is obligated to pay rent although the building or buildings are destroyed by fire, flood or other casualty." Hovenkamp & Kurtz, *Principles of Property Law* §9.4, 6th Ed, West.

⁵"This duty [to repair] remains to this day in most jurisdictions for the commercial tenant. Such a landlord has no duty to repair the leased premises, absent an express covenant in the lease." Burke & Snodgrass, *Property: Examples & Explanations*, Aspen 2001, Ch. 18. Furthermore, although it was not stated too clearly in the opinion, the structure looks like a single-occupant building, making the roof unlikely to be treated as a common area under the landlord's retained control, and thereby generating some independent obligation on the landlord to replace or repair it.

⁶"As an actual eviction by the landlord is wrongful, so must a constructive eviction be caused by a wrong laid to the landlord." Stoebuck & Whitman, *Hornbook on Real Property* §6.33

⁷These are commercial premises and the landlord is probably subject to a less rigorous duty to mitigate as is the case for residential abandonments. "Some states have extended the duty to mitigate damages to commercial tenancies on the ground that they should be governed by ordinary contract principles that encourage parties to avoid damages by acting to protect their interest when a promisor breaches. . . . However, other courts resist the trend, holding that a commercial landlord has no duty to mitigate damages when a tenant abandons the premises before the end of the lease term." Singer, Introduction to Property §10.4. Aspen, 2d Ed, 2005. But even if this landlord has a duty to mitigate, how much can he be expected to receive from renting a building with a leaking roof? Or does mitigation mean that he has to replace the roof at his own expense?

⁸"Under this doctrine [permissive waste], a tenant was obligated to exercise reasonable care to protect the leased premises from injury. Each tenant had a duty to effect any minor repairs that were necessary to maintain the condition of the premises." Sprankling, *Understanding Property Law*, Lexis 2000 §17.02.

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should use ordinary care to preserve the premises against the action of the elements - at least cover up the roof before the rains start. A failure to do so could make the tenant liable for the resulting loss,⁹ e.g., the buckled floor. The fact that the lease provision was held not to compel the tenant to purchase a new roof does not mean that it would be held also to absolve the tenant from paying for the floor that was ruined because it was not covered. The duty to avoid waste is a separate obligation and does not depend on the existence of an underlying repair covenant in the lease; indeed a tenant might have a duty to avoid waste (cover up the roof now) even where the lease imposes upon the landlord the duty to repair it (later, after notice, etc.).

A different complication arises if the roof caves in entirely. The old common law made destruction of the premises legally irrelevant - the tenant still had its leasehold estate,¹⁰ but that has often been replaced by the civil law rule that loss or destruction of a material part or a material inducement for entering the lease allows termination.¹¹ However, if the tenant is wrong in its opinion that it is entitled to quit, then its departure is simply a wrongful abandonment, subjecting it to rent or damage liability.

Finally, there is the city, where the building is located; under its building and safety codes, it surely can revoke the certificate of occupancy and padlock premises with a bad roof until it is replaced. If the tenant is thus locked out by the city, does she still owe rent? The burden of code compliance is initially on the owner of property, but in many cases - as here - the tenant has covenanted to keep the premises in compliance with these codes. Those clauses act like repair clauses in putting the burden on the tenant to do the work but that does not mean that they will be treated any better than the roof clause was here.¹² It is unlikely that a compliance clause would lead to a result contrary to what a maintenance clause is held to require.

But that still leaves unanswered the questions of whether the tenant will continue to owe rent after the premises have been shut down by the city, or whether the landlord can evict the tenant, either to get rid of her or just to get the city off his back. Answering all of these speculative questions can be rather uncomfortable. ■

⁹ Failure to avoid waste is also often a ground for eviction. Possibly, the landlord might be entitled to evict the tenant for not covering the roof even if he cannot evict her for failing to replace it.

¹⁰ "The question has frequently arisen whether destruction of or injury to part of the premises, ordinarily a building upon the land leased, terminates the liability for rent, and the great majority of the decisions are, as elsewhere stated, to the effect that, apart from a statute or special stipulation to the contrary, the liability for rent continues as before. This view involves the view that the tenancy itself still continues." *Tiffany Real Property*, Herbert T. Tiffany and Basil Jones. §154.

¹¹ "Dissatisfaction with the inequities of the common-law rule led to the enactment of a group of statutes beginning during the last century. They were aimed at the rule that continues a tenant's liability for rent after destruction by sudden unexpected casualty such as fire, flood, tornado, and the like, though the tenant had been without negligence or other fault. Not all the statutes are this broad. A few are limited to damage by fire and therefore make no change in the tenant's common-law status with respect to damage from other causes. Although there is considerable variety among the statutes, all have two matters in common. They apply only if the parties have not agreed otherwise and can be overridden by provisions of a lease. They relieve a tenant from his common-law liability only if the tenant and his subtenants, if any, are free of fault for the destruction." *Friedman on Leases*, Milton R. Friedman and Patrick A. Randolph, Jr. PLI 2004, § 9:2

¹² Perhaps with intentional irony, *Friedman on Leases* opines: "It is basic that a lease will be construed as the parties intended. In searching for this intention the courts have not allowed themselves to be pinned down by the language of these broad clauses." *Friedman on Leases*, Milton R. Friedman and Patrick A. Randolph, Jr. PLI 2004 §11.1 That certainly is the case in California where our courts reject a "four corners" analysis (i.e., what the words actually say) in favor of a multifactor analysis that involves e.g., considering the nature of the repair, the duration of the term, the remaining life of the lease, etc. See *Brown v Green* (1994) 8 C4th 812, 35 CR2d 598; *Hadian v Schwartz* (1994) 8 C4th 836, 35 CR2d 589. That approach obviously makes it hard to predict results.