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Recovering sale expenses after tenant's abandonment:

Millikan v American Spectrum. 2004

Roger Bernhardt

Depending on facts, commercial landlord may recover from tenant expenses incurred in selling property after tenant's abandonment of lease.

Millikan v American Spectrum Real Estate Servs. Cal., Inc. (2004) 117 CA4th 1094, 12 CR3d 459

Landlord leased an entire office building to Tenant for a term of five years. After three years, Tenant abandoned the property. The unfulfilled lease called for a base monthly rent of \$12,462 during year four and \$12,802 during year five. The building was encumbered by a secured loan on which Landlord had a payment of \$6071 per month. After Tenant abandoned, Landlord listed the property for sale or lease. Landlord received no lease offers and sold the building in August of year four. In its successful suit against Tenant, Landlord's judgment of \$270,785 included an award of selling expenses of \$141,491.

The court of appeal affirmed, holding that the sale of the property after Tenant's abandonment did not deprive Landlord of his contract remedies for breach of the lease. The court rejected Tenant's argument that the law imposed a blanket prohibition on a landlord's recovery of selling expenses from a tenant who has abandoned a lease. The court stated that whether a landlord was entitled to recover selling expenses depended, as in any other calculation of damages for breach of contract, on the particular facts of the case.

The court pointed out that nothing precluded a sale of the property from being a reasonable mitigation of damages by a landlord after termination of the lease resulting from a tenant's abandonment. See CC §1951.2. The court explained that §1951.2 provides contract remedies to the landlord that would have been unavailable at common law upon termination of the lease by surrender or otherwise. Under §1951.2, Landlord was entitled to recover all contract damages caused by Tenant's breach, unless Tenant could prove that some or all of the rental loss could have been avoided. The court concluded that, in this case, substantial evidence supported the award of selling expenses as consequential damages under §1951.2(a)(4) because it was foreseeable that Landlord could end up selling the property to mitigate his damages: The trial court could reasonably infer that Tenant had reason to know that Landlord would not be able to bear the burden of a vacant building indefinitely, because Tenant had abandoned the entire building with only one month's notice. The court also noted that Tenant offered no evidence at all to show that the sale expenses could have been avoided, or that they were unreasonable in amount.

THE EDITOR'S TAKE: This tenant abandoned its premises while its lease had two years to run. With an annual rent of approximately \$150,000 per year, that amounts to \$300,000, either as rent under CC §1951.4 (if it applied), or as damages under CC §1951.2 since no replacement was ever found.

For calculations of that sort, resale expenses by the landlord are entirely irrelevant, as is the resale itself. The landlord shows the present value of the lost rents and the tenant shows

how much that could have been offset for finding a replacement, and all that is true whether or not the landlord also sells the building. The calculations are mostly hypothetical and do not at all depend on the identity of the landlord.

In this case, however, the landlord was seeking an additional recovery of \$6000 for expenses in selling the building after the tenant left and \$57,000 for prepaying its mortgage loan as part of the sale. (Since the total judgment was only \$270,000, the numbers don't seem to work out; maybe the landlord lowered its loss by a security deposit or a letter of credit.) The case turns not on the rental loss, but on these other expenses.

Our statute does provide for consequential losses (CC §1951.2(a)(4)) over and above rental loss (CC §1951.2(a)(1)–(3)). While I would have found it beyond ordinary foresight that a landlord is likely to have to sell its building when its tenant abandons, this court thought otherwise, and that was a question of fact. Once these losses were determined to be foreseeable, they were, of course, recoverable.

I wonder, however, whether the tenant would have been better off if, instead of arguing that the selling expenses were barred as a matter of law, it had instead contended that those expenses were just part of the larger picture of the resale itself and it was the bigger picture that had to be considered. For instance, could those resale expenses have been offset by a profit made on the resale (comparing the sale price with the original acquisition price)? Could the prepayment fee have been offset by the benefit of getting out of an above-market loan? But to make those contentions is surely to invite the landlord to say that it sold the building at a *loss* (*i.e.*, for less than it would otherwise have received) due to the timing of the tenant's departure, and to assert that the tenant should be liable for that as well!

I get a headache whenever I have to deal with CC §1951.2, because of its daunting formulas. Must the parties complicate it even further by these kinds of calculations? There ought to be a law (written in plain English—not like §1951.2). —*Roger Bernhardt*