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Commercial Tenants Beware: Self-Helping Your Business Out of Its Lease

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Commercial tenants are often faced with a situation in which they believe that the landlord has failed to comply with the express or implied terms of a commercial lease. When faced with a difficult landlord (or at least a landlord who is perceived as such) commercial tenants often feel justified in withholding rent or making repairs themselves and offsetting the rent to cover the cost of such repairs. This can be extremely dangerous for the tenant, because the landlord may decide to simply declare a material breach of the lease and evict the tenant.

Take the following example: a commercial tenant is faced with a chronically leaking roof that interferes with the tenant's business operations. Despite the tenant's requests that the landlord repair the roof pursuant to the lease, the landlord fails to make the repairs quickly enough or even refuses to do so. Believing that the landlord has breached the express terms of the lease, the tenant decides to withhold its rent or to pay the rent into an escrow account until the landlord complies with its repair obligations. The landlord, in response, serves eviction papers.

The above is a simplified fact pattern of what actually occurred in *Matte v. Shippee*, 152 N.H. 216 (2005). The trial court attempted to bring some common sense to the situation and ruled that, after certain offsets, if the tenant released the remaining rent it had paid into escrow to the landlord, the court would deny the eviction. The New Hampshire Supreme Court reversed, finding that the district court, which has jurisdiction over landlord-tenant matters in New Hampshire, lacked the authority to impose such a remedy. The Supreme Court ruled that, because the tenant breached the lease by failing to pay rent, it should have been evicted. It did not matter that the landlord had also breached the lease by failing to make repairs, because New Hampshire still applies the so-called "Independent Covenant Rule": a breach by one party to a lease does not necessarily justify a breach by the other party.

South Willow Properties v. Burlington Coat Factory, 159 N.H. 494 (2009), which involved another leaking roof, reached a similar result. The landlord argued that roof leaks had been caused by tenant Burlington Coat Factory's negligent construction activity. Burlington Coat Factory disagreed and believed the landlord had the obligation to repair the roof. When the landlord did not replace the roof as quickly as it wanted, Burlington Coat Factory demolished the roof and installed a new roofing system without the landlord's permission and over its objection. Following installation of the roof, the landlord moved to evict Burlington. The district

court ordered eviction, finding that a) the tenant had caused the damage to the roof; and b) Burlington had not obtained the landlord's approval of plans and specifications for the proposed self-help remedy (demolition and replacement of the roof). On appeal, the New Hampshire Supreme Court unanimously affirmed the trial court's decision.

The lesson is simple: commercial tenants must exercise extreme caution before deciding to not pay rent, deciding to make structural repairs or materially breaching a lease in any way, if the tenant values the lease. The fact that a landlord may be in breach of its obligations under the lease will not excuse the tenant's decision to breach if the landlord decides to evict.

What can a tenant do under circumstances where it believes that the landlord has breached the lease? The tenant does not have to endure a landlord's breach, and has rights under the lease and New Hampshire common law. The tenant should request that the landlord comply with its obligations and the tenant should give the landlord a reasonable period of time to comply. The request should be well documented. If the landlord fails to cure the problem, the tenant can seek assistance from the courts to enforce its rights under the lease and to force the landlord to comply with the landlord's obligations. The tenant may also seek damages for lost profits and/or loss of use of the premises in certain circumstances. If the tenant chooses the alternative remedy of performing its own repairs, it must be careful to abide by the terms of the lease. If it is, the tenant should be able to remain in possession and sue the landlord for the costs of making the repairs.

There are many traps for the unwary in this area. Before breaching a lease, tenants are advised to seek legal advice from a practitioner with experience in the area. Otherwise, the tenant may be faced with eviction, interruption of business and a costly relocation.

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