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No Harm, No Foul - Measuring Damages in Commercial Lease Cases

Legal Update

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At first glance, it would seem a commercial tenant's failure to maintain the leased premises in violation of the lease's terms would allow the landlord to recover the costs necessary to make the repairs. In a recent case, however, the North Dakota Supreme Court declined to award the costs of repair, finding that the diminution in value of the premises was a more appropriate measure of damages. *Three Aces Properties v. United Rentals (North America), Inc.* 2020 ND 258.

The lease in *Three Aces* required the tenant to "maintain the parking area . . . in a condition similar to that existing at the time [the tenant] took occupancy...." The tenant, however, failed to maintain the asphalt parking lot and covered it with rock instead of repairing the asphalt. The trial court found that the tenant breached the maintenance provisions of the lease. The landlord argued that, as a result, it should be entitled to the \$2.7 million costs of repairing the parking lot. The landlord made this argument despite the fact it had not repaired the parking lot and had since sold the leased premises (at a profit) for development as a convenience store. Therefore, it was not surprising that the tenant argued that the landlord had suffered no damages.

The North Dakota Supreme Court adopted the tenant's argument and found that the appropriate measure of damages for breach of a repair covenant in a commercial lease is the *lesser* of the cost to repair or the diminution in value. Because the value of the leased property at the conclusion of the lease was more than twice the value at the lease's commencement, the Court found that the landlord had suffered no damages. In reaching its decision, the Court cited the landlord's duty to mitigate its damages. However, not all states impose a duty on landlords to mitigate their damages. See *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293, 297 n. 2 (Tex. 1997). It is possible that in states that do not impose a duty on landlords to mitigate damages, such as Minnesota, the holding in *Three Aces* may be different.