LANDLORD AND TENANT—LANDLORD SEEKING DAMAGES FROM DEFAULTING TENANT IS UNDER DUTY TO MITIGATE HIS DAMAGES BY MAKING REASONABLE EFFORTS TO RE-LET APARTMENT WRONGFULLY VACATED BY TENANT—*Sommer v. Kridel*, 74 N.J. 446, 378 A.2d 767 (1977).

On March 10, 1972, Abraham Sommer, the owner of "Pierre Apartments," rented apartment 6-L to James Kridel for a two-year term.[1] Although occupancy was to have begun on May 1, 1972, Kridel gave written notification on the nineteenth of that month that he would be unable to take possession of the apartment.[2] Shortly

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[1] Sommer v. Kridel, 74 N.J. 446, 449, 378 A.2d 767, 769 (1977). The lease was to have commenced on May 1, 1972, and would have terminated on April 30, 1974. *Id.* at 449, 378 A.2d at 769. There was an addendum to the lease which granted "a rent concession for the first six weeks." *Id.*; *see* Brief and Appendix for Plaintiff-Appellant at 7a, Sommer v. Kridel, 153 N.J. Super. 1, 378 A.2d 774 (App. Div. 1975), *rev'd*, 74 N.J. 446, 378 A.2d 767 (1977) [hereinafter cited as Brief and Appendix for Plaintiff-Appellant]. Therefore, "the first month's rent was not due until June 15, 1972." 74 N.J. at 449, 378 A.2d at 769.

Among other provisions, the "Standard Form of Apartment Lease" contained the following covenants:

> 4. Without obtaining the prior written consent of Landlord thereto in each instance, Tenant shall not have the power to nor shall it sell, assign, transfer, mortgage, pledge or encumber this lease or any interest in this lease or sublet the apartment or any part thereof . . . .
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> . . . .
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> 14. (c) . . . . The failure or refusal of Landlord to relet the apartment or any part or parts thereof, or if the apartment is relet, the failure of Landlord to collect all or part of the rent under such reletting, shall not discharge or affect Tenant's liability for rent or for damages or make Landlord liable to Tenant in anyway whatsoever.

Brief and Appendix for Plaintiff-Appellant, *supra*.

[2] Petition for Certification and Appendix at vi, Sommer v. Kridel, 74 N.J. 446, 378 A.2d 767 (1977) [hereinafter cited as Petition for Certification and Appendix]; *see* 74 N.J. at 449, 378 A.2d at 769. In a letter to Sommer, Kridel explained:

> "I was to be married on June 3, 1972. Unhappily the engagement was broken and the wedding plans cancelled. Both parents were to assume responsibility for the rent after our marriage. I was discharged from the U.S. Army in October 1971 and am now a student. I have no funds of my own, and am supported by my stepfather.
>
> In view of the above, I cannot take possession of the apartment and am surrendering all rights to it. Never having received a key, I cannot return same to you.
>
> I beg your understanding and compassion in releasing me from the lease, and will of course, in consideration thereof, forfeit the 2 month's rent already paid.
>
> Please notify me at your earliest convenience."

74 N.J. at 449–50, 378 A.2d at 769. Sommer never responded to the letter. *Id.* at 450, 378 A.2d at 769.

thereafter, a third party asked to see the apartment for the purpose of renting it, but was told it was unavailable "since it was already rented to Kridel."[3] Prior to eventually reletting the apartment,[4] Sommer sued Kridel for the total amount due under the two-year lease.[5] After a mistrial, Sommer filed an amended complaint seeking judgment against Kridel for the amount representing his actual lost rental receipts.[6] The trial court found "that justice and fair dealing" placed a duty upon the landlord to mitigate damages by attempting to relet the abandoned apartment and that "under settled principles of contract law" a failure to do so barred him from recovery.[7] The appellate division, in a per curiam opinion, reversed, finding no sound legal or equitable reason to require the landlord to mitigate his damages.[8]

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[3] Sommer v. Kridel, 74 N.J. 446, 450, 378 A.2d 767, 769 (1977).

[4] *Id.* Sommer re-entered the apartment in August of 1973; for the first time since Kridel's lease had been signed, he exhibited it to prospective tenants. *Id.* He subsequently leased it to a new tenant for a term to begin on September 1, 1973, at a monthly rental rate the same as Kridel's. *Id.*

[5] *Id.*

[6] Petition for Certification and Appendix, *supra* note 2, at iv; *see* Sommer v. Kridel, 74 N.J. 446, 450, 378 A.2d 767, 769 (1977). In his amended answer, Kridel alleged that Sommer had "breached the contract," "failed and refused to mitigate damages," and "through his actions and . . . the actions of his agents, servants, and employees caused a surrender of the lease." Brief and Appendix for Plaintiff-Appellant, *supra* note 1, at 2a–3a; *see* 74 N.J. at 450, 378 A.2d at 769.

[7] Sommer v. Kridel, No. L-34324-71, slip op. at 8 (N.J. Super. Ct. Law Div. July 2, 1974) (citations omitted), *aff'd in part, rev'd in part per curiam*, 153 N.J. Super. 1, 378 A.2d 774 (App. Div. 1975), *rev'd*, 74 N.J. 446, 378 A.2d 767 (1977); 74 N.J. at 450–51, 378 A.2d at 769. The trial court reached this decision despite its conclusion that "[t]he lease provisions reflect what has been referred to as the 'settled law' of this state that a landlord is not under any duty to mitigate damages by re-letting the premises after abandonment or default of the tenant." Sommer v. Kridel, slip op. at 4 (citations omitted); *see* 74 N.J. at 450, 378 A.2d at 769.

The tenant-defendant also contended that the landlord "[was] barred from relief by reason of his acceptance of the surrender of the premises proffered by . . . [the tenant] in his letter of May 19, 1972." Sommer v. Kridel, slip op. at 9. The trial court determined that since the "offer to surrender was unequivocal, . . . the landlord had a duty to make some response if he wished to reject it." *Id.* at 11. Consequently, the trial court held that the landlord's silence constituted an acceptance of the offer to surrender, thereby terminating the tenancy and the tenant's obligation to pay rent under the lease. *Id.*

[8] Sommer v. Kridel, 153 N.J. Super. 1, 7, 378 A.2d 774, 777 (App. Div. 1975), *rev'd*, 74 N.J. 446, 378 A.2d 767 (1977). The appellate court posited two reasons why the landlord was not under a duty to mitigate. First, the lease imposed no such duty on the landlord, instead its terms specifically relieved him of such an obligation. *Id.* at 6–7, 378 A.2d at 777. Second, even if "the lease provision was . . . against public policy," the court could not justify compelling the landlord to relet the abandoned apartment when he had other vacant apartments to rent. *Id.* at 7, 378 A.2d at 777.

The appellate court also reversed the trial court's determination that the landlord, by his silence, had accepted the tenant's offer to surrender. *Id.* at 6, 378 A.2d at 777.

A similar controversy arose when Riverview Realty Co., the owner and landlord of a residential apartment building, and Carlos Perosio, a prospective tenant, entered into a written two-year lease agreement for apartment 5-G.[9] Unlike Kridel, however, Perosio had entered into possession and occupied the apartment for approximately one year, after which time he abandoned the premises.[10] On October 31, 1974, Riverview Realty Co. instituted an action to recover the rent which had accrued to that date.[11] The trial court granted Riverview's motion for summary judgment and rejected Perosio's affirmative defense that Riverview had failed to mitigate its damages.[12] The

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Conversely, the court determined that if the tenant was to be relieved from his obligations under the lease he had to prove that "there ha[d] been a surrender by act and operation of law" which had been accepted by the landlord. *Id.* at 5–6, 378 A.2d at 776. Finding the evidence to the contrary, the court held that the tenant had not carried this burden of proof and thus no "surrender by act and operation of law" had occurred. *Id.*

[9] Sommer v. Kridel, 74 N.J. 446, 451, 378 A.2d 767, 770 (1977). Occupancy was to have commenced on February 1, 1973 and to have terminated on January 31, 1975. *Id.* The lease signed by Perosio, like that of Kridel, contained a provision "prohibit[ing] the tenant from subletting or assigning the apartment without the [landlord's] consent." *Id.* Furthermore, the lease provided that the landlord had the right, at his option, "to re-enter and relet the premises as the [tenant's] agent." Riverview Realty Co. v. Perosio, 138 N.J. Super. 270, 272, 350 A.2d 517, 518 (App. Div. 1976), *rev'd sub nom.* Sommer v. Kridel, 74 N.J. 446, 378 A.2d 767 (1977); *see* 74 N.J. at 451, 378 A.2d at 770.

[10] Riverview Realty Co. v. Perosio, 138 N.J. Super. 270, 271, 350 A.2d 517, 518 (App. Div. 1976), *rev'd sub nom.* Sommer v. Kridel, 74 N.J. 446, 378 A.2d 767 (1977); *see* 74 N.J. at 451, 378 A.2d at 770. Pursuant to the lease agreement, the rent was "payable in advance on the first day of each month." Brief of Plaintiff-Respondent at 2, Riverview Realty Co. v. Perosio, 138 N.J. Super. 270, 350 A.2d 517 (App. Div. 1976), *rev'd sub nom.* Sommer v. Kridel, 74 N.J. 446, 378 A.2d 767 (1977) [hereinafter cited as Brief of Plaintiff-Respondent]. When Perosio vacated the apartment, his next rental payment was due February 1, 1974. 74 N.J. at 451, 378 A.2d at 770.

[11] Sommer v. Kridel, 74 N.J. 446, 451, 378 A.2d 767, 770 (1977). Although the lease was to have terminated on January 31, 1975, the "October 1974" date was used in calculating the amount of recoverable rent since it represented "the last month for which rent was due before the institution of the action." Brief of Plaintiff-Respondent, *supra* note 10, at 2–3.

[12] Riverview Realty Co. v. Perosio, 138 N.J. Super. 270, 271, 350 A.2d 517, 518 (App. Div. 1976), *rev'd sub nom.* Sommer v. Kridel, 74 N.J. 446, 378 A.2d 767 (1977); *see* 74 N.J. at 451, 378 A.2d at 770. Perosio also alleged that there had been a surrender and acceptance of the premises. 74 N.J. at 451, 378 A.2d at 770. In granting the landlord's motion for summary judgment, the trial court stated that

> "[t]he defense of surrender is supported by no affidavit, and I consequently must ignore it. . . . There is nothing to submit to a fact finder in this case because . . . the remaining defense of failure to mitigate is not supported by New Jersey law."

Brief for Plaintiff-Respondent, *supra* note 10, at 9. On appeal, the tenant-defendant "abandoned his defense of surrender and acceptance." *Id.* at 3. Thus, the sole issue focused upon by the court was the status of the law in New Jersey regarding "the availability of the defense of mitigation in a landlord-tenant relationship governed by

appellate division affirmed, despite its expressed disdain for such a result.[13] Constrained "by controlling precedents,"[14] the court held that in view of the lease provision expressly prohibiting assignment or subletting without the landlord's written consent, the landlord could rightfully leave the premises vacant for the entire term and sue to "recover the total accrued rent."[15]

The Supreme Court of New Jersey granted certification in these cases,[16] and a unanimous court in *Sommer v. Kridel*[17] reversed both appellate courts, expressly abolishing the prior non-mitigation rule.[18] The court, through Justice Pashman, held that "[a] landlord has a duty to mitigate damages where he seeks to recover rents due from a defaulting tenant."[19] Furthermore, the court placed on the landlord

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a lease such as the one controlling this litigation." 138 N.J. Super. at 271–72, 350 A.2d at 518.

[13] Riverview Realty Co. v. Perosio, 138 N.J. Super. 270, 273–74, 350 A.2d 517, 519 (App. Div. 1976), *rev'd sub nom.* Sommer v. Kridel, 74 N.J. 446, 378 A.2d 767 (1977). With iconoclastic zeal, the appellate court stated:

> There appears to be no reason in equity or justice to perpetuate such an unrealistic and uneconomic rule of law which encourages an owner to let valuable rented space lie fallow because he is assured of full recovery from a defaulting tenant. . . . Since courts in New Jersey and elsewhere have abandoned ancient real property concepts and applied ordinary contract principles in other conflicts between landlord and tenant, there is no sound reason for a continuation of a special real property rule to the issue of mitigation.

Id. (citations omitted).

[14] Riverview Realty Co. v. Perosio, 138 N.J. Super. 270, 272, 350 A.2d 517, 519 (App. Div. 1976), *rev'd sub nom.* Sommer v. Kridel, 74 N.J. 446, 378 A.2d 767 (1977). The court noted that if confronted with the same "issue untrammeled by controlling precedents," it "would . . . [have applied] ordinary contract principles" and allowed "a tenant . . . to prove failure to mitigate in reduction of damages with the burden of proving the same cast upon him." 138 N.J. Super. at 272–73, 350 A.2d at 519.

[15] Riverview Realty Co. v. Perosio, 138 N.J. Super. 270, 272, 350 A.2d 517, 518 (App. Div. 1976), *rev'd sub nom.* Sommer v. Kridel, 74 N.J. 446, 378 A.2d 767 (1977). The appellate court realized, however, that

> [d]espite our view as to what the law should be, we are constrained to decide this case in accordance with the New Jersey precedents . . . , particularly because one of the cases was decided by the highest court of our state. . . . Under such circumstances, as an intermediate appellate court, we have no authority to change the law and must leave it for consideration by the Supreme Court.

138 N.J. Super. at 274, 350 A.2d at 519 (citations omitted).

[16] Sommer v. Kridel, 69 N.J. 395, 354 A.2d 323 (1976); Riverview Realty Co. v. Perosio, 70 N.J. 145, 358 A.2d 191 (1976).

[17] 74 N.J. 446, 378 A.2d 767 (1977). These cases dealt exclusively with residential leases. The court distinguished residential from commercial leases and reserved for future consideration "whether a landlord must mitigate damages in a commercial setting." *Id.* at 456 n.4, 378 A.2d at 772.

[18] *Id.* at 449, 460, 378 A.2d at 769, 774.

[19] *Id.* at 457, 378 A.2d at 773.

"the burden of proving that he used reasonable diligence in attempting to re-let the premises."[20] In so holding, the court stated "that antiquated real property concepts," which were the bases for the non-mitigation rule, would "no longer be controlling where there is a claim for damages under a residential lease,"[21] but rather, "more modern notions of fairness and equity" would govern.[22]

Essential to an understanding of the significance of *Sommer v. Kridel*[23] is a familiarity with the origins of the modern lease and the transformation that such arrangements have undergone over the past centuries. Fundamental aspects of present-day landlord and tenant law originated during the feudal system, which, at the time of the Norman Conquest, was universal throughout England.[24] The masses in England's populace who performed agricultural services for the feudal lords were known as "villeins."[25] Although the tenant in villeinage had "status,"[26] he had neither contractual nor property rights in the land.[27]

Due to changing social and economic conditions during the

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[20] *Id.* For the specific factors, outlined by the court, which should be considered in the determination of "whether the landlord has satisfactorily carried his burden," *id.* at 458, 378 A.2d at 773, see notes 133–37 *infra* and accompanying text.

[21] 74 N.J. at 456–57, 378 A.2d at 772–73. For an analysis of the effect of common law "real property concepts," *id.*, on the landlord's duty to mitigate, see notes 24–38 *infra* and accompanying text.

[22] 74 N.J. at 457, 378 A.2d at 773. For an analysis of the role of "modern notions of fairness and equity," *id.*, in the evolution of the landlord's duty to mitigate, see notes 79–93 *infra* and accompanying text.

[23] 74 N.J. 446, 378 A.2d 767 (1977).

[24] J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 195 (2d ed. 1975); *see* Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443, 447 (1972); Levinson, *Basic Principles of Real Estate Leases*, 1952 U. ILL. L.F. 321, 322.

[25] Hicks, *supra* note 24, at 447; 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 358–59 (2d ed. S.F.C. Milsom 1968).

[26] Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?*, 9 KAN. L. REV. 369, 371 (1961); *see* Hicks, *supra* note 24, at 447–48; Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 WIS. L. REV. 19, 24. It has been theorized that the landlord-tenant relationship has progressed "from status to contract to property to modern contract." Lesar, *supra* at 377; *see* Hicks, *supra* note 24, at 447–52; Love, *supra* at 23–27. It is through this transition in the landlord and tenant relationship that the evolution of the landlord's duty to mitigate can be detailed.

[27] Lesar, *supra* note 26, at 369; Love, *supra* note 26, at 24. "A villein was a serf, but not a slave." He possessed his house and land "at the will of . . . [his] lord." Hicks, *supra* note 24, at 447. Lacking seisin, the villein tenant did not have any property rights in the land. Lesar, *supra* at 369. For example,

> if the tenant in villeinage was ejected, either by his lord or by a third person, the king's court would not restore him to the land, nor would it give him damages against his lord in respect of the ejectment.

1 F. POLLOCK & F. MAITLAND, *supra* note 25, at 360.

twelfth and thirteenth centuries,[28] the "villeinage" was eventually supplanted by the tenancy for a term of years.[29] The "termor," in contrast to the villein, had recognizable and enforceable contractual rights in the land.[30] With the development of certain common law writs,[31] particularly that of ejectment, the agricultural tenant for a term of years was able to enforce actual property rights, rather than rights based merely on contract.[32] As a result of the availability of these writs, courts came to regard the leasehold as an estate.[33] The tenant, in exchange for his payment of rent, acquired a right to possession and attendant incidents of ownership.[34] Any interaction between the landlord and the tenant over control and use of the land was unnecessary and considered undesirable.[35] Since the obligations

[28] *See* RESTATEMENT (SECOND) OF PROPERTY, Introduction, at 1 (Tent. Draft No. 1, 1973) (tenancy for a term of years used as device to circumvent church's prohibition against usury); Hicks, *supra* note 24, at 449 (tenancy for term of years used as method to encourage laborers to engage in agricultural pursuits); Levinson, *supra* note 24, at 322 (statute of *Quia Emptores Terrarum* sounding death knell for "sub-infeudation and thereafter the grantee . . . was to hold of the same person of whom the grantor had held").

[29] Hicks, *supra* note 24, at 448; Lesar, *supra* note 26, at 370; Love, *supra* note 26, at 24.

[30] Hicks, *supra* note 24, at 449. Since the tenancy for a term of years as originally developed bore the stigma associated with a usurious device, the English courts were initially dissuaded from recognizing any possessory interest of the tenant in the land. Also, since the tenant lacked seisin he was denied "the benefit of real actions in the King's courts." Love, *supra* note 26, at 25; *see* 2 F. POLLOCK & F. MAITLAND, *supra* note 25, at 36.

[31] RESTATEMENT (SECOND) OF PROPERTY, *supra* note 28, Introduction, at 2, 3 (writ of *quare ejecit infra terminum* enabling lessee to recover possession of land from an ejector who had purchased it from his lessor; form of writ of trespass, namely, *de ejectione firmae*, used by lessee to recover damages against all ejectors).

[32] Hicks, *supra* note 24, at 450; *see* 1 AMERICAN LAW OF PROPERTY § 3.1, at 175–76 (A.J. Casner ed. 1952); 1 H. TIFFANY, THE LAW OF REAL PROPERTY § 73, 108–09 (3d ed. B. Jones 1939). With the continued development of the writ system and the proliferation of the husbandry lease, the tenant came to be regarded as the holder of an estate in property which was conveyed to him by the landlord. The concomitant aspect of this development was the belief that "the landlord . . . surrendered almost all of his interest in the premises for the term." RESTATEMENT (SECOND) OF PROPERTY, *supra* note 28, Introduction, at 4; *see* 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 221[1], at 179 (rev. ed. 1977).

[33] *See* Love, *supra* note 26, at 26.

[34] *Id.* "Originally, rent was a form of feudal service" rendered to the lord by his tenants. Like other feudal services, it was thought "to issue from and be owed by the land itself." Harvey, *A Study To Determine Whether the Rights and Duties Attendant Upon the Termination of a Lease Should Be Revised*, 54 CALIF. L. REV. 1141, 1144–45 (1966). Since rent was "owed to the landlord from and during the . . . [tenant's] estate, the tenant's duty to pay" rent ceased only upon the termination of his estate. *Id.* at 1145.

[35] Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past With Guidelines for the Future*, 38 FORDHAM L. REV. 225, 228 (1969).

of both parties to the lease were fulfilled by the transfer of possession and the payment of rent,[36] an abandonment of the premises by the tenant did not affect his obligation to pay rent during the term of his leasehold.[37] The landlord was under no duty to attempt to relet the premises in mitigation of his damages. Rather, he could "allow the premises to lie vacant and . . . hold the tenant for the full rent."[38] Undoubtedly, the lease-conveyance concept and the non-mitigation doctrine were easily assimilated into the body of fifteenth and sixteenth century English property law, "not because of the logic of the theor[ies], but because in the agrarian economy to which [they were] applied, [they] worked."[39]

Consistent with these common law precedents, early case law in New Jersey recognized the lease as a conveyance—the transfer of an estate in land from the landlord to the tenant.[40] In contradistinction to these common law concepts, however, New Jersey courts initially considered it the landlord's duty to mitigate damages.[41] The issue of

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> The landlord was *not* expected to assist in the operation of the land. Quite the reverse, he was expected to stay as far away as possible. In other words, for the term of the lease, the lands were subject to the tenant's, not the landlord's care and concern. Should the landlord interfere, he risked violating real property law.

Id. (emphasis in original).

[36] *Id.* at 227–28.

[37] Harvey, *supra* note 34, at 1145. *See also* RESTATEMENT (SECOND) OF PROPERTY § 11.1, Comment i., at 12 (Tent. Draft No. 3, 1975) (modern provision in accord with common law rule).

[38] 1 H. TIFFANY, A TREATISE ON THE LAW OF LANDLORD AND TENANT § 182, at 1170 (1912); *see* RESTATEMENT (SECOND) OF PROPERTY, *supra* note 37, § 11.1(3), at 4; 1 AMERICAN LAW OF PROPERTY, *supra* note 32, § 3.99, at 392; 2 A. REEVES, A TREATISE ON THE LAW OF REAL PROPERTY § 653, at 919 (1909); 3A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1345, at 629 (repl. 1959).

[39] RESTATEMENT (SECOND) OF PROPERTY, *supra* note 28, at 4.

[40] *E.g.*, Shimer v. Phillipsburg, 58 N.J.L. 506, 506, 33 A. 852, 852 (Sup. Ct. 1896); Spielmann v. Kliest, 36 N.J. Eq. 199, 202–04 (Ch. 1882). In New Jersey, the proposition that the lease was a conveyance of an estate, whereby the tenant became the owner of the premises during the term, was buttressed by other considerations. First, the tenant could bring an action in ejectment or trespass against anyone, including the landlord, who wrongfully entered on the premises. Rivoli Holding Co. v. Ulicny, 109 N.J. Eq. 54, 56–57, 156 A. 369, 370 (Ch. 1931); Totten v. Dreier, 79 N.J.L. 450, 450–52, 75 A. 778, 779 (Sup. Ct. 1910). Secondly, the landlord was not under a duty to make repairs which arose during the tenant's term. Barthelmess v. Bergamo, 103 N.J.L. 397, 398, 135 A. 794, 794 (Ct. Err. & App. 1927). Thirdly, liability was imposed upon the tenant for injuries to third parties, rightly on the premises, resulting from dangerous conditions existing thereon. McKeown v. King, 99 N.J.L. 251, 254–55, 122 A. 753, 755 (Ct. Err. & App. 1923); Zak v. Craig, 5 N.J. Misc. 275, 279, 136 A. 410, 412 (Sup. Ct. 1927).

[41] Zabriskie v. Sullivan, 80 N.J.L. 673, 675, 77 A. 1075, 1076 (Sup. Ct. 1910), *aff'd per curiam*, 82 N.J.L. 545, 81 A. 1135 (Ct. Err. & App. 1911).

mitigation was first addressed by a New Jersey court, albeit peripherally, in the 1910 case of *Zabriskie v. Sullivan*.[42] The court, in holding that a year-to-year tenant had a duty to give the landlord six months notice of his intention to vacate,[43] stated that once the tenant vacated the premises, "it became the duty of the landlord to rent them in diminution of the damages of the tenant."[44] Nevertheless, within ten years, the same court, in *Muller v. Beck*,[45] "embarrassed by [the] remark in" *Zabriskie*,[46] held that the landlord was *not* bound to seek a tenant in order to minimize the damage of the lessee.[47] In criticizing the *Zabriskie* case,[48] the *Muller* court characterized the "re-

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[42] 80 N.J. L. 673, 77 A. 1075 (Sup. Ct. 1910), *aff'd per curiam*, 82 N.J.L. 545, 81 A. 1135 (Ct. Err. & App. 1911).

[43] 80 N.J.L. at 675, 77 A. at 1076.

[44] *Id.* In support of this statement, the court cited Dolton v. Sickel, 66 N.J.L. 492, 49 A. 679 (Sup. Ct. 1901), *aff'd per curiam*, 68 N.J.L. 731, 54 A. 1124 (Ct. Err. & App. 1903), and Meeker v. Spalsbury, 66 N.J.L. 60, 48 A. 1026 (Sup. Ct. 1901). In *Dolton*, the court dealt with the issue of whether a reletting, under the circumstances, was tantamount to an eviction which would relieve the tenant of his liability for rent. 66 N.J.L. at 493, 49 A. at 679. The court held that the landlord's reletting was merely a constructive eviction which would "impose upon the landlord no penalty other than that of crediting the tenant with the sum so earned by the property, during the term." *Id.* In *Meeker*, the court determined that due to the landlord's remodeling of the premises after an abandonment by the tenant, a surrender by act and operation of law had occurred. 66 N.J.L. at 64, 48 A. at 1027. The court noted, however, that the subsequent reletting to a new tenant "alone [did] not effectuate a surrender." *Id.* For judicial criticism of the supportive value of these cases to the *Zabriskie* requirement of mitigation, see note 51 *infra* and accompanying text.

[45] 94 N.J.L. 311, 110 A. 831 (Sup. Ct. 1920).

[46] *Id.* at 312, 110 A. at 831.

[47] *Id.* at 313–14, 110 A. at 832.

[48] It has been posited that *Zabriskie* and *Muller* are not inapposite and can be reconciled. *See* 3 U. NEWARK L. REV. 216, 218 (1938). The two cases are factually distinguishable since the lease in *Muller* contained a provision which prohibited the tenant from reletting or assigning the premises without the written consent of the landlord, while the lease in *Zabriskie* did not. *Id. Compare* Muller v. Beck, 94 N.J.L. 311, 311, 110 A. 831, 831 (Sup. Ct. 1920) *with* Zabriskie v. Sullivan, 80 N.J.L. 673, 673, 77 A. 1075, 1075 (Sup. Ct. 1910), *aff'd per curiam*, 82 N.J.L. 545, 81 A. 1135 (Ct. Err. & App. 1911). Such a clause is of extreme importance since it

> shows an obvious desire on the part of the landlord to restrict the premises to a particular type tenant. Having found such a tenant in the original lessee, the landlord prohibits subletting to protect himself from the lessee putting into possession a subtenant who might be viewed as undesirable. Assuming that a general rule requiring the landlord to mitigate damages existed, such a stipulation in the lease would be more than ample to spell an exception to that rule.

3 U. NEWARK L. REV. at 218–19.

Furthermore, since the "remark" of Justice Voorhees in *Zabriskie* has never been expressly overruled, it may represent a minority view having been stated by a later appellate court. Petition for Certification and Appendix, *supra* note 2, at 2–3; *see* Carey v. Hejke, 119 N.J.L. 594, 596, 197 A. 652, 653 (Sup. Ct. 1938).

mark,"[49] with respect to mitigation, as "mere *dictum*,"[50] not supported by any precedent[51] and therefore not binding.[52]

Applying property precepts, as opposed to those of contract,[53] the *Muller* court asserted that the landlord could not interfere with the tenant's "estate for years,"[54] except to prohibit its transfer.[55] According to the court's analysis, the very "terms of the lease [were] . . . inconsistent with the claim that the landlord must make an effort to secure a tenant in order to minimize the damages."[56] The court posited that the clause in the lease which prohibited the tenant from reletting or subletting without the landlord's consent "demonstrate[d] that the landlord meant to have a right to choose his tenants."[57] Therefore, a "claim that [the landlord] *must* accept a new tenant or forego his rent" was deemed incongruous with the specifically reserved right of the landlord to reject a proposed tenant.[58] Furthermore, in interpreting another lease provision which authorized the

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[49] 94 N.J.L. at 312, 110 A. at 831.

[50] *Id.*

[51] *Id.* The *Muller* court reasoned that the cases cited in *Zabriskie* as support for the mitigation rule, in fact, "d[id] not support the *dictum*." *Id.* Those opinions addressed issues "inapplicable to a case where the tenant voluntarily vacates the premises during the term, and to a case where the defendants admit liability to damages but claim that the landlord should have minimized them." *Id.* at 313, 110 A. at 831–32; *see* note 44 *supra*.

[52] 94 N.J.L. at 312, 110 A. at 831. The *Muller* court, however, stated that it decided this case "on its own facts" and refrained from dealing with the general issue of mitigation. *Id.* at 313, 110 A. at 832.

[53] *Id.* at 313–14, 110 A. at 832. Under contract principles, a non-breaching party claiming damages for a breach of contract has the duty to mitigate his loss. Frank Stamato & Co. v. Lodi, 4 N.J. 14, 21, 71 A. 2d 336, 339 (1950); Ramsey v. Perth Amboy Shipbuilding and Eng'r Co., 72 N.J. Eq. 165, 168, 65 A. 461, 462 (Ch. 1906), *aff'd per curiam*, 73 N.J. Eq. 742, 70 A. 1101 (Ct. Err. & App. 1908).

[54] 94 N.J.L. at 314, 110 A. at 832.

[55] *Id.* at 313, 110 A. at 832.

[56] *Id.* at 314, 110 A. at 832. Although the court's approach to the lease might appear to be contractual, its analysis should be viewed as highlighting the incidents of an estate for years, rather than the contractual relationship between the parties. *See* notes 37–38 *supra*.

[57] *Id.* at 313, 110 A. at 832.

[58] *Id.* at 314, 110 A. at 832 (emphasis added). The landlord when selecting a particular tenant may do so with consideration of the overall management of his property. If the original tenant were allowed to terminate the relation by locating a substitute tenant, then the landlord's management scheme might be frustrated. For example,

> [t]he proposed tenant might be insolvent, or, at best, weaker financially than the lessee; he might be of improper character; or propose to conduct an improper business; or a business that the landlord disliked or feared might in the long run be a damage to the property. For any of these reasons, or for other reasons or no reason at all, the landlord might properly say: "I do not like the proposed tenant. He cannot have an estate in my property."

Id. at 313–14, 110 A. at 832.

landlord to re-enter the abandoned premises "at his option,"[59] the court refused to burden the landlord with an obligation to re-enter and attempt to relet the apartment.[60] Instead, the court construed "the word 'option' " to "[mean] that the landlord ha[d] a choice."[61] Likewise, the court reasoned that the landlord should not be placed in the dilemma of having "to speculate on whether it is . . . advisable to seek another tenant."[62]

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[59] *Id.* at 314, 110 A. at 832.

[60] *See id.* The court stated that to require the landlord to attempt to mitigate his damages "would force him to give his time to hunting someone to contract with him for the purpose of helping the tenant out of a liability to damages which the tenant had brought on himself." *Id.*

[61] *Id.* In accord with the *Muller* court's rationale, one of the most commonly advanced justifications for the non-mitigation rule is that the tenant should not, by his own wrongful acts, impose on his landlord the duty to seek out new tenants. *E.g.*, Jordon v. Nickell, 253 S.W. 2d 237, 238–39 (Ky. 1952); Browne v. Dugan, 189 Ark. 551, 561, 74 S.W. 2d 640, 645 (1934). *See generally* 1 AMERICAN LAW OF PROPERTY, *supra* note 32, § 3.11, at 203. Ancillary to the "imposed duty" justification for the non-mitigation rule is the fear that, once obliged to search for a substitute tenant, the landlord "would be required to [continually] seek out new tenants." Wohl v. Yelen, 22 Ill. App. 2d 455, 464, 161 N.E. 2d 339, 343 (App. Ct. 1959).

Many theorists, however, question the validity of this justification. By the Hohfeldian method of analysis, the relationship has apparently been misnamed.

> If this relation of the [landlord-] plaintiff to the [tenant-] defendant were a *duty* in the strict, legal sense, it would follow that if he failed to make a reasonable attempt to mitigate, he would himself be *subject to an action for damages*. But such is not the consequence. If he fails to mitigate his damages, he is only under a legal *disability* to collect from the [tenant-] defendant for the items which might reasonably have been prevented. Furthermore, but entirely separate and distinct, the [landlord-] plaintiff has a legal *power*, by attempting to mitigate, to create in the [tenant-] defendant a duty to *pay the costs* of his reasonable attempts.

28 YALE L.J. 827, 828 (1919) (emphasis in original); *see* Hicks, *supra* note 24, at 515; 30 YALE L.J. 100, 100–01 (1920); 29 YALE L.J. 130, 130–31 (1919); 45 WASH. L. REV. 218, 218 n.2 (1970). *See generally* Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917); Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

[62] 94 N.J.L. at 314, 110 A. at 832. Implicit in the court's reasoning is the frequently asserted objection to the extension of the mitigation requirement to the landlord-tenant relationship. Logically following the premise that a lease is a conveyance of an estate is the proposition that the landlord, by reletting the premises upon the abandonment by the tenant, creates a new estate which is incompatible with the estate of the original tenant. If the first lease was in existence at the time of the reletting, the landlord would not have the power to create a new estate by the second lease. "Two exclusive rights of possession to the same land during the same period cannot coexist, and the law gives validity to the new and destroys the old tenancy." McCormick, *Rights of the Landlord Upon Abandonment of the Premises by the Tenant*, 23 MICH. L. REV. 211, 212 (1925). Therefore, the creation of the second lease implies that the landlord no longer recognizes the continued existence of the first lease. Thus, the first lease is "surrender[ed] by operation of law," thereby releasing the original tenant from his obligation to pay the subsequently accrued rent. McCormick, *supra*; *see* Welcome v. Hess, 90 Cal. 507, 514, 27 P. 369, 371 (1891); Hicks, *supra* note 24, at 517. One commentator has argued:

Consonant with the holding in *Muller*, the New Jersey court of errors and appeals, in *Joyce v. Bauman*,[63] found "frivolous"[64] a tenant's defense that the landlord had "refused to accept a proposed tenant" and thereby had failed to minimize his damages.[65] Without articulating any underlying rationale, the court applied the *Muller* non-mitigation rule and held that the tenant's allegation, even if true, was "immaterial"[66] and "properly stricken" by the trial court.[67]

In the subsequent lower court cases which have addressed the issue of a landlord's duty to mitigate, the vast majority of the decisions are consistent with *Joyce*.[68] For example, in *Heyman v. Linwood Park, Inc.*,[69] the appellate division found the proposition "that the landlord [was] under no duty to re-enter and relet" the abandoned premises to be "the settled law of this State."[70] The court emphasized the fact that the lease prohibited assignment or subletting by the tenant without the landlord's consent and gave the landlord "the usual option"[71] to relet upon the tenant's abandonment.[72] Simi-

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> Can it not be said that the landlord's action in reletting is an act inconsistent with the continuation of the landlord-tenant relationship, since it deprives the tenant of future access to the premises, and therefore, such action should constitute an acceptance of the proffered surrender? . . . Once this view is accepted, obviously, the notion of reletting in mitigation of damages is lost.

Groll, *Landlord-Tenant: The Duty to Mitigate Damages*, 17 DE PAUL L. REV. 311, 315 (1968).

[63] 113 N.J.L. 438, 174 A. 693 (Ct. Err. & App. 1934). The lease in this case, similar to the one in *Muller*, contained a provision which prohibited the tenant from assigning or subletting the premises without the written consent of the landlord. *Id.* at 440, 174 A. at 694; *see* note 57 *supra* and accompanying text. Before overruling *Joyce*, the supreme court, in *Sommer*, recognized it as the definitive statement of the law with respect to the non-mitigation rule in landlord-tenant relationships. 74 N.J. at 448–49, 378 A.2d at 768–69.

[64] 113 N.J.L. at 440, 174 A. at 694.

[65] *Id.* at 440, 174 A. at 693–94. As a defense, the tenant alleged that "[t]he plaintiff refused to accept a proposed tenant and minimize the damages, but permitted the premises to become vacant." *Id.* at 439, 174 A. at 693.

[66] *Id.* at 440, 174 A. at 694.

[67] *Id.* It should be noted that the lease in *Joyce* contained a provision, similar to the one in *Muller*, which prohibited the tenant from assigning or subletting the premises without the landlord's written consent. *Id.*

[68] *See* Weiss v. I. Zapinsky, Inc., 65 N.J. Super. 351, 359, 167 A.2d 802, 806 (App. Div. 1961); Heyman v. Linwood Park, Inc., 41 N.J. Super. 437, 441, 125 A.2d 345, 347 (App. Div. 1956); Zucker v. Dehm, 128 N.J.L. 435, 436, 26 A.2d 564, 565 (Sup. Ct. 1942). *But see* Carey v. Hejke, 119 N.J.L. 594, 596, 197 A. 652, 653 (Sup. Ct. 1938) (landlord's duty to relet premises and diminish damages).

[69] 41 N.J. Super. 437, 125 A.2d 345 (App. Div. 1956).

[70] *Id.* at 441, 125 A.2d at 347.

[71] *Id.* The appellate court's recognition of the "option" as "usual" supports an argument frequently made by legal commentators against the mitigation rule. Landlords

larly, in the 1961 decision of *Weiss v. I. Zapinsky, Inc.*,[73] the appellate division, in interpreting a lease which contained these same provisions,[74] found that the "landlord [was] under no duty to exercise such an option."[75]

In the past decade and a half, however, the property basis for the non-mitigation rule—the recognition of the lease as a conveyance—has undergone intensive judicial scrutiny. Sentient of changing social conditions,[76] the parties to the modern lease, in an attempt to fortify their respective positions, have inserted in the lease numerous covenants of varied import and detail.[77] In response to the proliferation of such covenants, there has developed "a clearly discernible tendency" for courts, in the construction of leases, to apply contract, rather than property, principles.[78] In the vanguard of such development, the New Jersey supreme court, in a series of recent cases, has interpreted the lease in a manner which is hardly consistent with the

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almost universally attempt to avoid the imposition of such a duty by inserting in the lease this restrictive provision. Since the landlord and tenant, as parties to the lease, could have placed the duty to mitigate upon the landlord by covenant, "the absence of such a covenant indicates a lack of desire to do so." Hicks, *supra* note 24, at 517. Therefore, courts, by forcing landlords to relet their premises in mitigation of their damages, convert "a license given in the lease ('*may* re-enter and relet') into a duty imposed by law ('*must* re-enter and relet')." *Id.* at 518 (emphasis in original).

[72] 41 N.J. Super. at 441, 125 A.2d at 347.

[73] 65 N.J. Super. 351, 167 A.2d 802 (App. Div. 1961).

[74] *Id.* at 359, 167 A.2d at 806. Although the lease contained a covenant which provided that a tenant could not assign the lease or sublet the premises, this covenant was not at issue since the tenant had not attempted to make an assignment or sublease. *See id.* Rather the issue centered upon the lease provision which gave the landlord or his representatives the right at his option to re-enter and relet the premises upon the tenant's abandonment. *Id.*

[75] *Id.*

[76] An attempt to catalog the social, economic and political changes which have affected the landlord-tenant relationship would be beyond the scope of this note. Suffice it to say that a more detailed explanation of these factors can be found in: 2 POWELL, *supra* note 32, ¶ 221 [1], at 180 (growth of cities); RESTATEMENT (SECOND) OF PROPERTY, *supra* note 28, at 4–5 (industrialization); Bennett, *The Modern Lease—An Estate in Land or a Contract*, 16 TEX. L. REV. 47, 47–48 (1937) (industrialization); Hicks, *supra* note 24, at 451–52 (urbanization).

[77] *See* Hicks, *supra* note 24, at 451–52; Lesar, *supra* note 26, at 374. It is also recognized that the landlord and tenant have resorted to using convenants as a protective device against "[t]he complexities of city life, and the proliferated problems of modern society in general." 2 POWELL, *supra* note 32, ¶ 221 [1], at 180.

[78] 6 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 890 A, at 592–93 (3d ed. 1962). The increase in the number and complexity of "lease covenants has reintroduced into the law of estates for years a predominantly contractual ingredient. In practice, the law today concerning estates for year consists chiefly of rules determining the construction and effect of lease covenants." 2 POWELL, *supra* note 32, ¶ 221 [1], at 180–81.

property notions that formed the basis for the holdings in *Muller* and *Joyce*.

In *Reste Realty Corp. v. Cooper*,[79] the court, while holding that "fair treatment for tenants" required the imposition upon the landlord of an implied warranty of habitability or fitness of the premises for the agreed use,[80] specifically indicated that this rule did not comport with the historical development of a lease as an estate for years.[81] Noting the "variant uses and types of leases" resulting from modern social and economic conditions,[82] the court admitted that the "[p]roponents of more liberal treatment of tenants" made persuasive arguments that "more realistic consideration should be given to the contractual nature of the [landlord and tenant] relationship."[83] Likewise, in the 1970 landmark decision of *Marini v. Ireland*,[84] the court, although cognizant of the fact that at common law the lease was "a conveyance of an interest in real estate,"[85] stated that the principles inherent in this concept, while " 'suitable for the agrarian setting in which it was conceived, lagged behind changes in dwelling habits and economic realities.' "[86] In addition, the court commented that "[t]he guidelines employed to construe contracts have been modernly applied to the construction of leases."[87] Consequently, in its determination that there arose an implied covenant in the lease which required the landlord to make repairs,[88] the *Marini* court applied contract principles and eschewed what it viewed to be antiquated concepts of real property.[89] Again evincing a marked departure from common law principles, the supreme court, in *Berzito v. Gambino*,[90] held that the landlord's covenant of habitability and the tenant's covenant to pay rent were mutually dependent.[91] It was the court's belief that while historical real property rules may have "fulfill[ed] the reason-

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[79] 53 N.J. 444, 251 A.2d 268 (1969).

[80] *Id.* at 454, 251 A.2d at 273.

[81] *Id.* at 451, 251 A.2d at 272. In the course of its opinion, the court noted that "historically, no implied warranty or covenant of habitability or fitness for the agreed use was imposed on the landlord." *Id.*

[82] *Id.*

[83] *Id.* at 452, 251 A.2d at 272.

[84] 56 N.J. 130, 265 A.2d 526 (1970).

[85] *Id.* at 141, 265 A.2d at 532.

[86] *Id.* (quoting Michaels v. Brookchester, Inc., 26 N.J. 379, 382, 140 A.2d 199, 201 (1958)).

[87] 56 N.J. at 141, 265 A.2d at 532.

[88] *Id.* at 144, 265 A.2d at 534.

[89] *Id.* at 143, 265 A.2d at 533.

[90] 63 N.J. 460, 308 A.2d 17 (1973).

[91] *Id.* at 469, 308 A.2d at 21.

able needs and expectations of landlords and tenants in the agrarian society of medieval England," they no longer sufficed "in modern urban and suburban society."[92] Articulating a philosophy which had been implicit in this line of decisions, the court expressed a predisposition to use "its creative powers in fashioning new remedies as need and occasion demand."[93]

Responding to just such an occasion, the court, in *Sommer v. Kridel*,[94] held that "[a] landlord has a duty to mitigate damages where he seeks to recover rents due from a defaulting tenant" by making reasonable efforts to relet the abandoned apartment.[95] Therefore, since the landlord failed to "[avoid] the damages which eventually accrued," the tenant "was relieved of his duty to continue paying rent."[96] Writing for a unanimous court, Justice Pashman reasoned that the application of the contractual principle of mitigation of damages to residential leases was "justified as a matter of basic fairness."[97] Under the court's analysis, the distinction between an ordinary residential lease "and an ordinary contract [could] no longer be considered viable."[98] The court found that the factual situation in *Sommer*

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[92] *Id.* at 468, 308 A.2d at 21.

[93] *Id.* at 469, 308 A.2d at 21; *see* text accompanying notes 80–81, 88–89 *supra*.

[94] 74 N.J. 446, 378 A.2d 767 (1977).

[95] *Id.* at 457, 378 A.2d at 773.

[96] *Id.* at 458, 378 A.2d at 773.

[97] *Id.* at 456, 378 A.2d at 772. To lend credence to this proposition, the court reiterated Professor McCormick's 1925 prophecy, wherein he anticipated that

> "the logic, inescapable according to the standards of a 'jurisprudence of conceptions' which permits the landlord to stand idly by the vacant, abandoned premises and treat them as the property of the tenant and recover full rent, will yield to the more realistic notions of social advantage which in other fields of the law have forbidden a recovery for damages which the plaintiff by reasonable efforts could have avoided."

Id. (quoting McCormick, *supra* note 62, at 222).

[98] 74 N.J. at 454, 378 A.2d at 771. The acceptance of the mitigation rule reflects the recent infusion of contract principles into landlord and tenant law. Acknowledging the contractual nature of the lease makes the requirement of mitigation "a logical extension of a well accepted contract principle." 1960 U. ILL. L.F. 332, 335.

Contract remedies are designed to compensate, rather than punish. *See* C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 137, at 560–61 (1935). Therefore, a rule of non-mitigation would be contrary to the traditional contract policy against awarding punitive damages. *See* 5 A. CORBIN, CONTRACTS § 1077, at 437–38 (1964); RESTATEMENT OF CONTRACTS § 342 (1932). One court has implicitly recognized the punitive nature of a landlord's arbitrary refusal to use reasonable efforts to relet. Thus, the court held that a lease provision for the forfeiture of rents to be paid for the remainder of the term, absent a requirement of reasonable diligence by the landlord to relet, "[was] an agreement for a penalty" which was disproportionate to actual damages and therefore void. Anderson v. Andy Darling Pontiac, Inc., 257 Wis. 371, 375, 43 N.W.2d 362, 364 (1950).

"present[ed] a classic example of the unfairness which occurs when a landlord has no responsibility to minimize damages."[99] Particularly disturbing to the court was the fact that "the landlord needlessly increased the damages by"[100] waiting fifteen months before attempting to relet the apartment, despite the availability of a substitute tenant.[101]

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[99] 74 N.J. at 457, 378 A.2d at 773. One commentator has observed that "[t]he rule of [non-mitigation] is oppressive, for it empowers a lessor to exact a tribute from a lessee saddled with a burdensome lease or bludgeon him into insolvency." 41 MINN. L. REV. 355, 359 (1957). The oppressive nature of the non-mitigation rule is evident in light of the trial court's determination in *Sommer*. If the non-mitigation rule had been applied, then the tenant, who "ha[d] no funds of [his] own, and [was] supported by [his] stepfather," would have been liable for a $5,865 judgment. 74 N.J. at 450, 378 A.2d at 769.

[100] 74 N.J. at 457, 378 A.2d at 773. Arguably, the landlord did not attempt to relet the abandoned premises because he feared that such actions might later be construed as a surrender of the lease by act and operation of law. *See* note 62 *supra*. In fact, the tenant, in his amended answer, did allege that the landlord "caused a surrender of the lease." Brief and Appendix for Plaintiff-Appellant, *supra* note 1, at 2a–3a.

Persuasive arguments can be made, however, to rebut a landlord's contention that he should not attempt to relet the premises since such actions would be construed by the courts as an acceptance of the tenant's surrender of the lease. To constitute a surrender of the lease by act and operation of law, not only must there be an abandonment by the tenant, but there must also be an acceptance by the landlord of the tenant's proffered surrender. Duncan Development Co. v. Duncan Hardware, Inc., 34 N.J. Super. 293, 300, 112 A.2d 274, 278 (App. Div. 1955). Additionally, "the minds of the parties must concur in a common intent of relinquishing the relation of landlord and tenant, and that intent must be executed by acts tantamount to a stipulation to put an end thereto." 34 N.J. Super. at 299, 112 A.2d at 277. Moreover, whether the facts constitute a surrender of the lease by operation of law

> is ordinarily a question of fact for the jury. The burden of proof is on the party alleging the surrender, and where it is to be inferred from circumstances or conduct inconsistent with an intention to perform, the proof must be clear.

Id. at 300, 112 A.2d at 278. The fact that the landlord seeks to relet the premises after an abandonment does not constitute, as a matter of law, an acceptance of the tenant's proffered surrender. O'Neil v. Pearse, 87 N.J.L. 382, 385, 94 A. 312, 313 (Sup. Ct. 1915), *aff'd per curiam*, 88 N.J.L. 733, 734, 96 A. 1102 (Ct. Err. & App. 1916). Furthermore, the landlord in reletting the abandoned premises may be acting not only for his personal benefit, but also "in the interest of [the] tenant, for, if [the landlord] had succeeded in reletting the property, the tenant would have been entitled to have credited on his obligation the amount received under the new lease." Banks v. Berliner, 95 N.J.L. 267, 271, 113 A. 321, 323 (Sup. Ct. 1921).

Nonetheless, this dilemma could be easily alleviated by the courts requiring the landlord to mitigate his damages by reletting the abandoned premises, but under a rebuttable presumption that the landlord was acting on behalf of the tenant. 45 WASH. L. REV. 218, 226 (1970). Also, some states have disposed of this objection by enacting legislation which provides that any attempt to mitigate damages shall not constitute an acceptance of the tenant's proffered surrender. *E.g.*, CAL. CIV. CODE § 1951.2(d) (West Cum. Supp. 1977) ("[e]fforts by the lessor to mitigate the damages caused by the lessee's breach of the lease do not waive the lessor's right to recover damages").

[101] *See* 74 N.J. at 457, 378 A.2d at 773. While the court recognized that a tenant's proffer of a substitute tenant will not necessarily excuse him "from his obligations under [the] lease," *id.*, Kridel was excused because there was no proof that the prospective

Additional theoretical support for the holding in *Sommer*, although not relied upon by the New Jersey supreme court, can be found by recourse to recent judicial and legislative pronouncements in other jurisdictions which have imposed a similar duty upon the landlord. For example, the Oregon supreme court, in *Wright v. Baumann*,[102] held, *inter alia*, that the "universally recognized" rule which imposes upon a landowner the obligation to mitigate damages upon the promisor's breach of a contract to make a lease,[103] was also applicable to a lessor upon the lessee's abandonment of the premises.[104] The *Wright* court emphasized that it would formulate rules for reward-

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"tenant would not have been suitable." *Id.* at 458, 378 A.2d at 773.

Commentators have recognized that, arguably, in light of the nature of the landlord-tenant relationship, the landlord should not have to accept, in this personal relationship, a substitute tenant whom the landlord finds undesirable. 1 AMERICAN LAW OF PROPERTY, *supra* note 32, § 3.56, at 295–96; Groll, *supra* note 62, at 319. While, superficially, this contention has some merit, a full examination of its basis is discrediting. In characterizing the lessor-lessee relationship as personal, courts have only done so in those cases where "the rent [was] reserved in terms of a fraction or percentage of the lessee's production, profits, or sales." 1 AMERICAN LAW OF PROPERTY, *supra*, § 3.56, at 295–96 (footnotes omitted). It is a personal relationship only when payment of the lessor's rent "depends upon the skill of the lessee." *Id.* at 296.

Assuming, however, that some residential leases are based on personal relationships between the lessor and lessee, it is still consistent with contract principles to require the landlord to relet to another tenant in an attempt to mitigate his damages. "[I]n employment contracts the personal element is even more important than that involved in a lease, yet the courts have held that wrongfully discharged employees must mitigate damages by accepting similar available employment." Wohl v. Yelen, 22 Ill. App. 2d 455, 464, 161 N.E.2d 339, 343 (1959); *see* Groll, *supra* note 62, at 319.

[102] 239 Or. 410, 398 P.2d 119 (1965). Although the New Jersey supreme court has noted that a majority of jurisdictions follow the non-mitigation rule, nevertheless, the court has perceived that "the trend among recent cases appears to be in favor of a mitigation requirement." 74 N.J. at 452, 453, 378 A.2d at 770–71. The following jurisdictions either expressly or implicitly recognize the landlord's duty to mitigate: Iowa, Vawter v. McKissick, 159 N.W.2d 538, 542 (Iowa 1968); Kansas, Gordon v. Consolidated Sun Ray, Inc., 195 Kan. 341, 344, 404 P.2d 949, 953 (1965); Michigan, Fox v. Roethlisberger, 350 Mich. 1, 3, 85 N.W.2d 73, 74 (1957); New Hampshire, Novak v. Fontaine Furniture Co., 84 N.H. 93, 96, 146 A. 525, 526 (1929); North Carolina, Weinstein v. Griffin, 241 N.C. 161, 165, 84 S.E.2d 549, 552 (1954); Oregon, Wright v. Baumann, 239 Or. 410, 414, 398 P.2d 119, 121 (1965); South Carolina, United States Rubber Co. v. White Tire Co., 231 S.C. 84, 95, 97 S.E.2d 403, 409 (1956); Utah, Meyer v. Evans, 16 Utah 2d 56, 57, 395 P.2d 726, 727 (1964); Washington, Martin v. Siegley, 123 Wash. 683, 687–88, 212 P. 1057, 1058–59 (1923); Wisconsin, St. Regis Apartment Corp. v. Sweitzer, 32 Wis. 2d 426, 434, 145 N.W.2d 711, 715 (1966). For a detailed discussion of Oregon's decision, see notes 103–04 *infra* and accompanying text.

[103] 239 Or. at 413, 398 P.2d at 120.

[104] *Id.* at 414, 398 P.2d at 121. The court rejected the "majority view" which absolved the lessor from any obligation to mitigate his damages since such a viewpoint was based on real property theories. *Id.* Viewing the transaction as "a contract," the court believed "[t]here [was] no reason why the principle of mitigation of damages should not be applied to it." *Id.*

ing damages so as " 'to discourage even persons against whom wrongs have been committed from passively suffering economic loss which could be averted by reasonable efforts. . . .' "[105] Furthermore, Justice O'Connell, speaking for the majority, reasoned that the requirement of mitigation would not impose upon the lessor a burden "any greater than that imposed upon promisees of contracts not relating to the occupancy of land."[106]

Similarly, support for the *Sommer* holding may be found by reference to the Uniform Residential Landlord and Tenant Act (URLTA) as proposed for enactment by the National Conference of Commissioners on Uniform State Laws and as adopted by several states.[107] In a succinct statement of the mitigation rule, the URLTA requires that "[i]f the tenant abandons the dwelling unit, the landlord shall make reasonable efforts to rent it at a fair rental."[108] Con-

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[105] *Id.* at 414, 398 P.2d at 121 (quoting C. MCCORMICK, *supra* note 98, § 33, at 127). One major benefit obtained from the extension of the mitigation rule to lease estates is the preservation of the economic welfare of the community through the discouragement of passive economic losses of individuals which could have been avoided by reasonable efforts. *See* C. MCCORMICK, *supra*, § 33, at 127; McCormick, *supra* note 62, at 222. The welfare and prosperity of "the public" is advanced by encouraging the productive use of property within the community. Martin v. Siegley, 123 Wash. 683, 687–88, 212 P. 1057, 1059 (1923). If mitigation is not required, however, then the landlord is permitted "to allow his property to remain idle and unproductive." Hicks, *supra* note 24, at 518. This is economically undesirable, especially in a period of an administratively recognized housing shortage, because it results in a further reduction of available residential rental units. Hicks, *supra* note 24, at 518–19; *see* U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, table 1335 (97th ed. 1977) (noting that from 1960 to the 1st quarter of 1975, the vacancy rate for rental units declined from 6.7 percent to 5.4 percent). Furthermore, the potential for damage resulting "from vandalism, accidental fire and undetected waste" increases when the premises remain unoccupied and vacant. Hicks, *supra* note 24, at 519.

[106] 239 Or. at 415, 398 P.2d at 121.

[107] Uniform Residential Landlord and Tenant Act § 4.203(c). The act was approved by the National Conference of Commissioners on Uniform State Laws in 1972 and has since been adopted by the following states: Alaska (ALASKA STAT. §§ 34.03.010–.380 (Cum. Supp. 1974)); Arizona (ARIZ. REV. STAT. §§ 33–1301 to 33–1381 (1974)); Florida (FLA. STAT. ANN. §§ 83.40 to .63 (West Supp. 1975)); Hawaii (HAW. REV. STAT. §§ 521–1 to 521–76 (Supp. 1974)); Kansas (KAN. STAT. ANN. §§ 58–2540 to 58–2573 (Supp. 1975)); Kentucky (KY. REV. STAT. §§ 383.505 to .715 (Supp. 1974)); Nebraska (NEB. REV. STAT. §§ 76–1401 to 76–1449 (Cum. Supp. 1974)); New Mexico (N.M. STAT. ANN. §§ 70–7–1 to 70–7–51 (Supp. 1975)); Oregon (OR. REV. STAT. §§ 91.700 to .865 (Supp. 1975)); Tennessee (TENN. CODE ANN. §§ 64–2801 to 64–2864 (Supp. 1975)); Virginia (VA. CODE §§ 55–248.2 to .40 (Supp. 1974)).

[108] U.R.L.T.A. § 4.203(c). One of the underlying purposes of the Act is "to . . . modernize, and revise the law governing the rental of dwelling units and the rights and obligations of landlords and tenants." *Id.* § 1.102(b)(1). It is noteworthy that in a comment on the underlying purposes of the Act, the Commissioners maintain that the English common law interpretation of the leasehold estate as a conveyance is "inappropriate to modern urban conditions and inexpressive of the vital interests of the parties

sequently, if the landlord fails to abide by this requirement, the sanction imposed by the Act is that "the rental agreement is deemed . . . terminated by the landlord as of the date the landlord has notice of the abandonment."[109]

Addressing a justification for the non-mitigation rule posited by the appellate division,[110] the *Sommer* court contended that such a rule could no longer "be predicated upon the possibility that a landlord may lose the opportunity to rent another empty apartment because he must first rent the apartment vacated by the defaulting tenant."[111] Even where the abandoned apartment is "in a multi-dwelling building," the court reasoned that "each apartment may have unique qualities which make it attractive to certain individuals."[112] Thus, even if the landlord has other vacant apartments, he must, in attempting to mitigate his damages, treat the abandoned apartment "as if it was one of his vacant stock."[113] The court thought it factually significant that "there was a specific request" by a prospective tenant to rent the particular apartment vacated by Kridel.[114] Therefore, the court concluded that "there [was] no reason to believe that absent this vacancy the landlord could have succeeded in renting a different apartment to this individual."[115]

By requiring the landlord to treat the abandoned apartment as one of his "vacant stock," however, a situation may arise where a landlord of a multiple dwelling would actually suffer an economic loss on the reletting transaction. If a prospective tenant decided to rent

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and the public which the law must protect." *Id.* § 1.102(b)(1), Commissioners' Comment, at 403.

[109] *Id.* § 4.203(c).

[110] Sommer v. Kridel, 153 N.J. Super. 1, 7, 378 A.2d 774, 777 (App. Div. 1975), *rev'd*, 74 N.J. 446, 378 A.2d 767 (1977). The appellate division posed the rhetorical question, "[w]hy should plaintiff [landlord] be compelled to lease defendant's apartment in order to mitigate defendant's damages when he has other empty apartments being held for rent?" 153 N.J. Super at 7, 378 A.2d at 777.

[111] 74 N.J. at 456, 378 A.2d at 772.

[112] *Id.*

[113] *Id.* at 457, 378 A.2d at 773.

[114] *Id.* at 456, 378 A.2d at 772.

[115] *Id.* It should be recognized, however, that the landlord could attempt to circumvent the court's holding by inducing the prospective tenant to rent one of the previously vacated apartments rather than the abandoned one. The landlord could offer the abandoned apartment at a higher rent than the previously vacant apartments. Such an increase in the rent could be justified as an attempt by the landlord to recoup the legal expenses involved in suing the defaulting tenant for the rents in arrears and the cost of reletting. Furthermore, one court has held that the landlord did not breach his duty to mitigate when he asked for a higher rental where it was known that the asked for rental rate was "a basis for negotiation." *In re* Garment Center Capitol, Inc., 93 F.2d 667, 668 (2d Cir. 1938).

the abandoned apartment, rather than one of the previously vacant apartments, a cursory examination might reveal no apparent loss to the landlord. First, he would be able to recover the reasonable cost of the reletting from the defaulting tenant.[116] Second, the rental income to the landlord from the re-leased apartment would remain the same since the defaulting tenant would be liable for the difference, if any, between the old rent reserved and that received under the new lease.[117] In actuality, however, the landlord may have lost the *profits* which would have been associated with the rental of one of the previously vacant apartments. If the stock of vacant apartments and the abandoned apartment are, indeed, of similar or standard quality, then the new tenant's fortuitous choice of the abandoned apartment effectively deprives the landlord of an opportunity to decrease his stock of previously vacant apartments.

The gravamen of this argument is the supposedly "unique qualities" of each apartment. The *Sommer* court, without citing any authority, noted the fact that each apartment in a multiple dwelling "*may* have unique qualities which make it attractive to certain individuals."[118] But implicit in the word "may" is a tacit recognition that the converse will, on occasion, also be true.[119] Furthermore, in the Stipulation of Facts under which *Sommer* was decided, it was agreed that there were "similar apartment[s] or apartment[s] of like kind to that of apartment 6L."[120] Also, the assumption of "unique qualities" appears to be contrary to a 1967 mandate by the New Jersey state legislature which requires that "the construction, alteration, repair, . . . maintenance, occupancy and use of new and existing . . . multiple dwellings"[121] provide the residents of New Jersey with "decent, *standard* and safe units of dwelling space."[122] The regulations promulgated under the Hotel and Multiple Dwelling Law represent a pervasive scheme of control which encompasses innumerable specifications and standards for the construction, maintenance and renovation of structures which fall within the purview of the Act.[123] In light

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[116] 74 N.J. at 458, 378 A.2d at 773.

[117] *See* Banks v. Berliner, 95 N.J.L. 267, 271, 113 A. 321, 323 (Sup. Ct. 1921); Dolton v. Sickel, 66 N.J.L. 492, 493, 49 A. 679, 679 (Sup. Ct. 1901), *aff'd per curiam*, 68 N.J.L. 731, 54 A. 1124 (Ct. Err. & App. 1903).

[118] 74 N.J. at 456, 378 A.2d at 772 (emphasis added).

[119] "May" is defined as "contingency." WEBSTER'S THIRD NEW INT'L DICTIONARY (1963).

[120] Brief and Appendix for Plaintiff-Appellant, *supra* note 1, at 6a.

[121] Regulations for Construction and Maintenance of Hotels and Multiple Dwellings, N.J. ADMIN. CODE 5:10–1.4 (Supp. Apr. 31, 1973).

[122] Hotel and Multiple Dwelling Law, N.J. STAT. ANN. § 55:13A-2 (West Cum. Supp. 1977–1978) (emphasis added).

[123] *See* Regulations for Construction and Maintenance of Hotels and Multiple Dwell-

of such comprehensive regulations, it is theoretically difficult to say that there are large deviations in the "statutory" quality of all apartments within a complying structure. It may also be possible to prove that there are no decisive variations in the "aesthetic" qualities between the abandoned apartment and the previously vacant apartments within a complying structure.[124] Yet, the decision in *Sommer* deprives the landlord of the opportunity to prove that the abandoned apartment is, in fact, similar to other apartments in his "vacant stock." He is forced to forego the opportunity to show that the new tenant's choice of the abandoned apartment, instead of a previously vacant apartment, was merely based upon its availability due to the old tenant's abandonment, rather than some nebulous qualities which made it unique. Since the rental payments made by the new tenant will actually be a *substitute* for those not paid by the defaulting tenant, the landlord is deprived of a new source of income and relegated to the hapless position of having to endure an economic loss without recourse to any court.

A better rule might be to allow the landlord the opportunity to demonstrate that the abandoned apartment did not have "unique qualities" which rendered it more attractive to the new tenant. If successful, he should be entitled to recover from the defaulting tenant, in addition to the reasonable cost of reletting, the profit associated with the rental of the abandoned apartment. If the landlord is permitted to recover such profit, the resulting judgment would be consonant with basic contract principles.[125]

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ings, N.J. ADMIN. CODE 5:10, Table of Contents, at 1–6 (Supp. Dec. 31, 1973). The enumerated regulations deal with construction classifications, building limitations, fire protection construction requirements, means of egress, special uses and occupancies, structural and foundation loads and stress, light, heat and ventilation control, mechanical ventilation, air conditioning and refrigeration systems, heating and combustion equipment, electrical equipment and wiring, plumbing, fire detection and extinguishing equipment, elevators and escalators, acoustic control, and maintenance provisions. *Id.*

[124] It has been argued that the *services* supplied by the landlord are the most important components of the lease agreement. Although, "[w]hen you rent an apartment, you are dealing with the landlord in terms of living space to be sure, . . . you are also dealing with him in terms of heat, light, sanitation, ingress and egress, and many other things." Quinn & Phillips, *supra* note 35, at 232, 251 (footnote omitted). It should be noted that these services are regulated by the Hotel and Multiple Dwelling Law. *See* note 123 *supra*. It has been judicially recognized that when tenants seek "shelter," they are actually "seek[ing] a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance." Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir. 1970) (footnote omitted).

[125] When losses are incurred in the efforts to mitigate damages, the *Restatement of Contracts* provides that "[d]amages are recoverable for *special* losses incurred in a reasonable effort . . . to avoid harm that the defendant had reason to foresee as a proba-

A persuasive analogy can be made to the lost profits rule of the Uniform Commercial Code (UCC), which "attempts to achieve nothing more or less than giving the seller the profit expected upon full performance."[126] The UCC provides that where the difference between the market price and the unpaid contract price of goods "is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit . . . which the seller would have made from full performance by the buyer."[127] This lost profits measure of damages is applicable to lost volume situations.[128] The landlord of a multiple dwelling who relets the abandoned apartment, instead of a previously vacant apartment, clearly is in a lost volume situation. He has lost the opportunity to increase his aggregate profits by an amount associated with the in-

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ble result of his breach when the contract was made." RESTATEMENT OF CONTRACTS § 336(2) (1932) (emphasis added). Furthermore, "[j]ustice requires that the risks incident to such reasonable efforts should be carried by the party whose wrongful conduct makes them necessary." *Id.*, Comment, at 541.

It can be argued that while other vacant apartments of similar or like quality remain unrented, a "special" loss to the landlord, inherent in the reletting of the abandoned apartment, is the profit he would have realized from the rental of one of the apartments in his previously vacant stock. Since "[d]amages are recoverable . . . for profits and other gains prevented by the breach," the landlord should be permitted to recover such profit if there is "a sufficient basis for estimating their amount in money with reasonable certainty." *Id.* § 331(1). Profits are defined as "the net pecuniary gain from a transaction, the gross pecuniary gains diminished by the cost of obtaining them." *Id.*, Comment b, at 516. In the landlord's situation, the net pecuniary gains would be the rent receipts ("gross pecuniary gains") diminished by the costs of renting ("cost of obtaining them"). *Cf.* N.J. STAT. ANN. § 2A:42–77(e) (West Cum. Supp. 1977–1978) (list of expenses to be deducted from annual income of a multiple dwelling in determining fair net operating income with respect to rent regulations).

[126] Childres & Burgess, *Seller's Remedies: The Primacy of UCC 2–708(2)*, 48 N.Y.U.L. REV. 833, 882 (1973).

[127] U.C.C. § 2–708(2) (1972 version); N.J. STAT. ANN. § 12A:2–708(2) (West 1962).

[128] Famous Knitwear Corp. v. Drug Fair, Inc., 493 F.2d 251, 254 (4th Cir. 1974); *see* Harris, *A Radical Restatement of the Law of Seller's Damages: Sales Act and Commercial Code Results Compared*, 18 STAN. L. REV. 66, 80–83 (1965). An illustration of a "lost volume" situation is as follows:

> [A]ssume a contract for the sale of a washing machine with a list price of $500. Buyer breaches, and seller resells that washing machine at the same list price the buyer had been willing to pay. However, the resale buyer is one of seller's regular customers who had intended to purchase a washing machine from him anyway. If the seller's total cost per machine was $300, he stood to gain an aggregate profit of $400, that is, $200 profit from each of two sales. Clearly the 2-708 contract-market differential formula is inadequate in this situation since it gives no damages to the seller who has lost a $200 profit because of the breach. In such a case the damage award should be the lost profit, that is, $200, for this will place the seller "in as good a position as performance would have done."

J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE §§ 7–9, at 226–27 (1972).

crease of one unit in the "volume" of rented apartments. Thus, the mere recovery of the difference between the new rent received (market price) and the old rent reserved (unpaid contract price) is inadequate to put the landlord in as favorable a position as he would have been in had the tenant fully performed. The proper measure of damages should include the profit which the landlord would have received by full performance from the tenant.

The *Sommer* court also held that as a part of the landlord's cause of action he would "be required to carry the burden of proving that he used reasonable diligence in attempting to re-let the premises."[129] While recognizing that such a holding was contrary to general contract principles,[130] the court reasoned that "the landlord [would] be in a better position to demonstrate whether he exercised reasonable diligence in attempting to re-let the premises."[131] In reversing and remanding the action brought by Riverview Realty Co. for factual determinations regarding the landlord's efforts to mitigate,[132] the court set forth guidelines to be used by the trial court "[i]n assessing whether the landlord ha[d] satisfactorily carried his burden."[133] The trial court was directed to consider "whether the landlord, either personally or through an agency, offered or showed the apartment to any prospective tenants, or advertised it in local newspapers."[134] If such evidence is offered by the landlord, then "the tenant may attempt to rebut . . . [it] by showing that he proffered suitable tenants who were rejected."[135] Ultimately, the court observed that "there is no

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[129] 74 N.J. at 457, 378 A.2d at 773.

[130] *Id.* In contract actions, the breaching party usually has the burden of proving that the damages were capable of being mitigated. *Id.*; Sandler v. Lawn-A-Mat Chem. & Equip. Corp., 141 N.J. Super. 437, 455, 358 A.2d 805, 815 (App. Div. 1976); C. MCCORMICK, *supra* note 98, § 33, at 130.

[131] 74 N.J. at 457, 378 A.2d at 773; *see* Vawter v. McKissick, 159 N.W. 2d 538, 542 (Iowa 1968).

[132] 74 N.J. at 458, 378 A.2d at 773.

[133] *Id.*

[134] *Id.* at 458–59, 378 A.2d at 773–74.

[135] *Id.* at 459, 378 A.2d at 774. Although the court failed to articulate any criteria to be used by the landlord in evaluating the suitability of the proffered substitute tenant, recourse to the American Bar Foundation's Model Residential Landlord-Tenant Code (Model Code) may be instructive. The Model Code provides that the landlord may reject any proposed tenant based on "any facts which reasonably indicate that the proposed tenancy would be less favorable to the landlord than the existing tenancy." MODEL RESIDENTIAL LANDLORD-TENANT CODE § 2-403(5) (Tent. Draft 1969) [hereinafter cited as MODEL CODE]. Furthermore, the landlord can make a realistic determination of the suitability of the proposed tenant because the Model Code requires that the prospective tenant "make a formal, written, signed offer to the landlord." *Id.* § 2-403(3). The offer must contain the prospective tenant's full name, age, marital status, occupation, place of employment, name and address of employer, names, ages and relationship to the pro-

standard formula for measuring whether the landlord has utilized satisfactory efforts in attempting to mitigate damages."[136] Therefore, "each case must be judged upon its own facts."[137]

It is, however, recognized that the major considerations for the apportionment of the burden of proof in any particular case ultimately rest "upon broad reasons of experience and fairness."[138] Yet, to place upon the landlord the burden of proving that he exercised "reasonable diligence in attempting to re-let the premises"[139] is both unfair and contrary to authority in many jurisdictions.[140] Although it is socially and economically justifiable to impose upon the landlord the duty to mitigate,[141] the additional burden of having to prove "reasonable diligence"[142]—a burden which, at best, is vaguely defined[143]—is unwarranted in light of the fact that the tenant's conduct was responsible for the breach.[144] Moreover, the court's justification for its apportionment of the burden—greater access to evidence—is, in many instances,[145] "overcome by a feeling that a charge of wrongdoing

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spective tenant of all other expected occupants, two credit references, and the names and addresses of the prospective tenant's landlords for the past three years. *Id.* § 2-403(3), (5).

[136] 74 N.J. at 459, 378 A.2d at 774.

[137] *Id.* Cognizant of the diverse factual situations in which the mitigation issue may arise, the court provided further guidance by citing decisions of other jurisdictions which have dealt with the issue. *Id.*

[138] 9 J. WIGMORE, EVIDENCE § 2486, at 278 (3d ed. 1940) (footnote omitted).

[139] 74 N.J. at 457, 378 A.2d at 773.

[140] The appellate division, in *Riverview Realty Co.*, would have applied "ordinary contract principles" and cast the burden of proving a failure to mitigate upon the tenant. 138 N.J. Super. 270, 272–73, 350 A.2d 517, 519 (App. Div. 1976), *rev'd sub nom.* Sommer v. Kridel, 74 N.J. 446, 378 A.2d 767 (1977). Furthermore, the following jurisdictions have placed the burden of proving a failure to mitigate upon the tenant: Illinois, Reget v. Dempsey-Tegler & Co., 70 Ill. App. 2d 32, 38, 216 N.E. 2d 500, 503 (1966); Indiana, Hirsch v. Merchants Nat'l Bank & Trust Co., 336 N.E. 2d 833, 836 (Ind. Ct. App. 1975); Kansas, Steinman v. John Hall Tailoring Co., 99 Kan. 699, 703, 163 P. 452, 454 (1917); Missouri, Whitehorn v. Dickerson, 419 S.W. 2d 713, 714 (Mo. Ct. App. 1967); Nebraska, Bernstein v. Seglin, 184 Neb. 673, 677, 171 N.W. 2d 247, 250 (1969); New York, Home Owners' Loan Corp. v. Baldwin, 265 App. Div. 864, 865, 37 N.Y.S. 2d 822, 822–23 (1942); Texas, Employment Advisors, Inc. v. Sparks, 364 S.W. 2d 478, 480 (Tex. Ct. Civ. App. 1973).

[141] *See* notes 97–109 *supra* and accompanying text.

[142] 74 N.J. at 457, 378 A.2d at 773.

[143] *See id.* at 458–59, 378 A.2d at 773–74.

[144] *See* Comment, *Landlord-Tenant Legislation: Revising An Old Common Law Relationship*, 2 PAC. L.J. 259, 269 (1971).

[145] James, *Burdens of Proof*, 47 VA. L. REV. 51, 60 (1961). Professor James noted that "[i]t is an everyday occurrence in litigation that a party has the burden to prove what his opponent's conduct was. Examples are negligence, contributory negligence, and breach of contract." *Id.*

should in fairness be proven by the party making it."[146] Also, "in view of the availability . . . of modern discovery" devices which enable evidence to be ferreted out before trial,[147] this rationale would seem to be of less import than the court has given it. Furthermore, such an apportionment of the burden of proof creates inconsistency within the court's opinion. Since the articulated rationale for imposing the duty to mitigate is the equitable application of contract principles to the lease, this allocation of the burden of proving an attempt to mitigate is an admitted contradiction of such principles.[148] It should be noted, however, that if the burden of proving mitigation is to remain on the landlord, then he should be permitted to show that he incurred an economic loss in the transaction, specifically, a loss of profit.

Although conscientious in its application of the "modern notions of fairness and equity" inherent in the contractual principle of mitigation, the *Sommer* court has failed to articulate an underlying policy rationale in its decision. It has been recognized by the American Bar Foundation that "where residential printed lease forms are typical, the bargaining position of the landlord results in imaginatively oppressive lease forms."[149] Since the landlord will not modify the favorable forms, the prospective tenant has "no choice but to sign the lease or reject the entire transaction."[150] Consequently, "the tenant becomes a party to a contract which he had little part in formulating,"[151] probably did not read, and furthermore, could not understand if he had read it.[152]

While the widespread adoption of the UCC has afforded protection against unconscionability to parties contracting for the sale of goods, such reform has largely bypassed the residential tenant.[153] To

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[146] James, *supra* note 145, at 60.

[147] Tortora v. General Motors Corp., 373 Mich. 563, 569, 130 N.W. 2d 21, 24 (1964).

[148] *Compare* 74 N.J. at 456–57, 378 A.2d at 772–73 *with id.* at 457, 378 A.2d at 773.

[149] MODEL CODE, *supra* note 135, at 9–10. It should be noted that both Kridel and Perosio signed standard form leases. Brief and Appendix for Plaintiff-Appellant, *supra* note 1, at 7a; Brief of Defendant-Appellant and Appendix at 11a-13a, Riverview Realty Co. v. Perosio, 138 N.J. Super. 270, 350 A.2d 517 (App. Div. 1976), *rev'd sub nom.* Sommer v. Kridel, 74 N.J. 446, 378 A.2d 767 (1977).

[150] Note, *The Form 50 Lease: Judicial Treatment of an Adhesion Contract*, 111 U. PA. L. REV. 1197, 1197 (1963).

[151] Comment, *The Uniform Residential Landlord and Tenant Act: New Hope for the Beleaguered Tenant?*, 48 ST. JOHN'S L. REV. 546, 550 (1974).

[152] Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247, 248 (1970).

[153] *See* Comment, *supra* note 151, at 549–50. The UCC provides that

> [i]f the court as a matter of law finds the contract or any clause of the con-

alleviate this disparity, however, the draftsmen of the URLTA have endeavored to protect the residential tenant from the unconscionable practices of the landlord. Reflecting the UCC's influence, the URLTA allows the courts to "look directly at the overall setting and the relationship of the parties"[154] and vitiate those leases and lease provisions they find to be unconscionable.[155] To determine if the entire lease or a particular provision therein is unconscionable, a court would have to ascertain "whether, in light of the background and setting of the market, the conditions of the particular parties to the rental agreement . . . are so one-sided as to be unconscionable . . . at the time of the making."[156] An application of this standard by the *Sommer* court would have necessitated a finding that the clauses which relieved the landlord of the obligation to re-enter and relet the apartment upon the tenant's abandonment were unconscionable when made and therefore unenforceable.[157] Granting the fact that the *Sommer* court

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tract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

U.C.C. § 2-302(1) (1972 version); N.J. STAT. ANN. § 12A: 2-302(1) (West 1962).

[154] King, *New Conceptualism of the Uniform Commercial Code: Ethics, Title, and Good Faith Purchase*, 11 ST. LOUIS U.L.J. 15, 19 (1966).

[155] U.R.L.T.A. § 1.303(a)(1). Section 1.303 of the URLTA is derived from section 2-302 of the UCC and provides:

(a) If the court, as a matter of law, finds
(1) a rental agreement or any provision thereof was unconscionable when made, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable provision, or limit the application of any unconscionable provision to avoid an unconscionable result; or
(2) a settlement in which a party waives or agrees to forego a claim or right under this Act or under a rental agreement was unconscionable when made, the court may refuse to enforce the settlement, enforce the remainder of the settlement without the unconscionable provision, or limit the application of any unconscionable provision to avoid an unconscionable result.
(b) If unconscionability is put into issue . . . the parties shall be afforded a reasonable opportunity to present evidence as to the setting, purpose, and effect of the rental agreement or settlement to aid the court in making the determination.

Id. § 1.303.

[156] U.R.L.T.A. § 1.303, Commissioners' Comment.

[157] In New Jersey, the enforceability of certain clauses in the lease depends upon whether the lease is for commercial or residential purposes. Since parties to a commercial lease have a parity of bargaining power, a finding that a residential lease provision is unenforceable would not mandate a similar finding in a commercial setting. *Compare* Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 587–88, 111 A.2d 425, 432 (App. Div. 1955) (exculpatory clause in residential lease invalid on grounds that it was contrary to public policy due to unequal bargaining positions between parties) *with* Midland Carpet Corp. v. Franklin Assoc. Properties, 90 N.J. Super. 42, 47, 216 A.2d 231, 234 (App. Div. 1966) (exculpatory clause in lease of industrial property held valid because of

did not deal specifically with the lease provisions, it should be recognized that such an analysis would have been consistent with the holding in *Sommer* because a finding of unconscionability would have enabled the court to *then* apply the doctrine of mitigation. The unconscionability approach has an added benefit, however, in that it would have permitted the court to explicitly excise from the lease the provisions which gave the landlord, upon the tenant's default, "the option of re-entering or re-letting"[158] and "prohibited the tenant from assigning or transferring the lease without the consent of the landlord."[159]

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equality of bargaining positions between parties). If, in fact, the commercial lease was "negotiated at arm's length between parties of equal bargaining power," Kruvant v. Sunrise Market, Inc., 58 N.J. at 456, 279 A.2d at 106, then the court would view the duties and rights of the parties as "created by and aris[ing] solely from the contract." Kuzmiak v. Brookchester, Inc., 33 N.J. Super. at 581, 111 A.2d at 428. Therefore, it would seem likely that if the parties to a commercial lease had specifically agreed to relieve the landlord of the duty to mitigate, the court would not impose such a duty upon him.

[158] 74 N.J. at 449 n.1, 378 A.2d at 769.

[159] *Id.*