Hastings Law Journal

Volume 12 | Issue 4 Article 8

1-1961

Leases: Application of Doctrine of Anticipatory Breach

Charles Patterson

statute, as the distributor usually has suffered extensive detriment in reliance, building storage facilities, purchasing trucks and other equipment, and advertising. Yet in the absence of estoppel, or termination by the distributor, the rule that the agreement implied a reasonable time for duration, which works principally to protect the parties from the consequences of sudden termination, is turned against them by the application of the Statute, whenever this reasonable time is found to have been over one year. The results could frequently be harsh.

*Philip F. Spalding**

* Member, Second Year class.

LEASES: Application of Doctrine of Anticipatory Breach

When a tenant under a lease of realty defaults thereon, abandons the premises and repudiates the lease, several difficult legal questions arise. What are the landlord's remedies? When may he bring an action? How much may he recover? May he retake possession of the property?

Historically rent has been considered a real property interest arising out of the land, while the lease has always been a combination of conveyance and contract.[1] The right to rent in early leases was a right arising from the privity of estate btween lessor and lessee, but the introduction into the lease of the covenant by the lessee to pay rent also gave the lessor a contract right. Thus the growth of the modern lease has been governed by rules developing from two distinct areas: Property Law and Contract Law. Often this leads to unusual results. This is noticeable where the tenant has abandoned the premises and repudiated the lease. In such a case the California Supreme Court has listed three alternative remedies:[2]

> (1) To consider the lease as still in existence and sue for the unpaid rent as it became due for the unexpired portion of the term; (2) to treat the lease as terminated and retake possession for ... [lessor's] own account; or (3) to retake possession for the lessee's account and relet the premises, holding the lessee for the difference between the lease rentals and what ... [lessor] was able in good faith to procure by reletting.

It can readily be seen that remedies one and two bear the mark of property law. In the first, the landlord merely ignores the abandonment and proceeds as if the lease is still in force. As the rent becomes due and goes unpaid, he sues for the rental period as if the tenant had occupied the land. In the second, the act of abandonment by the tenant plus the resumption of possession by the landlord for his own use results in a *surrender* by operation of law.

The third method of recovery seems to be one of the rules which attempts to combine property law and contract law. The leasing of the property to a third person following the tenant's abandonment manifests *surrender* by

[1] 7 HOLDSWORTH, HISTORY OF ENGLISH LAW 262-275 (1926).

[2] Kulawitz v. Pacific Woodenware & Paper Co., 25 Cal. 2d at 671, 155 P.2d at 28 (1944).

operation of law, which, under property law principles, ordinarily releases the tenant from the obligation to pay rent. However, the remedy provides that possession is being retaken for the lessee's account. This implies that the lease is still in force and that the lessee has contracted for the lessor to act as his agent. Even with a provision in the lease for this arrangement it seems difficult to apply the principles of either contract or property law.[3]

The basic problem with the above three remedies is that the landlord either gets no damages or if he does, he must wait until the end of the lease term to recover. At best, the landlord may get the chance to sue periodically. Keeping it in mind that the lease which the tenant has repudiated may still have a considerable period to run, the remedies appear harsh, especially if the property is not easily rented. There is another way for recovery of damages which has been applied to the repudiation cases in other states, relying on the contract doctrine of "anticipatory breach."[4] This doctrine has been accepted by the California Supreme Court for use in ordinary contracts. The court has taken the position that a total breach of contract arises where there has been a partial breach by the defendant followed by his repudiation of the contract, which allows the plaintiff to recover all past and prospective damages suffered in an action which he may bring immediately after the repudiation.[5] The view is also accepted by the court that a lease is both a contract and a conveyance, and there are two sets of rights and obligations, one based on privity of estate, and the other based on privity of contract.[6]

Since a lease is considered a contract, and the contract doctrine of anticipatory breach is a proper rule in California, it should follow that a landlord in California has an immediate action for damages resulting from his tenant's repudiation. The abandonment of the property by the tenant serves two purposes. It allows resumption of possession and termination of privity of estate, and it also manifests a breach and repudiation of a contract obligation. Nevertheless, in two cases decided within two years of each other, the California Supreme Court apparently rejected this contract approach.

In *Phillips-Hollman, Inc. v. Peerless Stages,*[7] decided in 1930, the tenant was an assignee of the original lessee. He defaulted in payment of rent, and in accordance with a lease provision, the lessor served him with a written demand that he immediately vacate. The tenant complied. The lease also contained a provision that upon default by the tenant he should not be released from his liability for periodic rent, and the lessor might re-enter and relet, the lessee being liable for the difference between the rent called for in the lease and the rental procured from reletting. The action was for the accrued rent less the amount obtained by reletting up to the date of the formal termination of the lease. The court stated:[8]

> . . . [The landlord] may take possession of the premises, relet the same and recover from the tenant any damages suffered thereby. Such damages will be the difference between the amount secured on the reletting and the amount

[3] See 2 TIFFANY, LANDLORD AND TENANT 1340, 1341 (1910).

[4] 4 CORBIN, CONTRACTS § 986 (1951).

[5] Gold Mining & Water Co. v. Swinerton, 23 Cal. 2d 19, 142 P.2d 22 (1943).

[6] Samuels v. Ottinger, 169 Cal. 209, 146 Pac. 638 (1915).

[7] 210 Cal. 253, 291 Pac. 178 (1930).

[8] *Id.* at 258, 291 Pac. at 180.

> provided for in the original lease. . . . In the absence of a covenant to the contrary . . . the law is well settled that the landlord cannot recover in installments, but must bring his action at the expiration of the original term, at which time the damages for the first time can be ascertained.

The landlord was allowed to recover because of the lease provision which held the tenant, by his covenant, to the periodic rent. It must be noted that *Phillips-Hollman* was not an anticipatory breach case. The tenant did not repudiate the lease. He was evicted in accordance with the lease agreement. The court seemed primarily interested in preventing multiple suits by the landlord, and its decision that the landlord, in the absence of a covenant, could not sue in installments appeared to be directed at that problem. The court did not mention anticipatory breach; yet it impliedly refuted the doctrine when it stated that the landlord must bring his action at the end of the original term.

In 1932, this implied refutation was strengthened when the California Supreme Court decided *Treff v. Gulko.*[9] The fact situation was similar to that of *Phillips-Hollman,* inasmuch as the tenant was an assignee of the original lessee, and he had defaulted in his rent. The court found that the evidence was insufficient to show that the tenant had assumed the obligations of the original lease, and that in absence of new contractual stipulation, there was no privity of contract between the assignee and the landlord. The absence of this factor alone would have prevented the contract doctrine of anticipatory breach from being applicable. However, the court noted that there was no provision in the lease requiring the tenant to pay damages in installments. The above quoted rule from *Phillips-Hollman* was restated, and it was mentioned that if the landlord could have recovered damages, he would have had to wait until the lease expired before he could bring his action. The court did not expressly renounce the doctrine of anticipatory breach, but its dicta implied a denial.

Both *Phillips-Hollman* and *Treff* rely on the same cases to support the rule that the landlord can only bring his action for damages at the end of the term.[10] It is necessary to briefly review the three supreme court decisions in an effort to define and understand the court's approach. In *Respini v. Porta*[11] the resumption of possession and reletting by the landlord after repudiation did not prevent him from recovering damages, but the damages were limited to the difference between the accrued rent and the rent actually received from the reletting. The landlord in *Respini* had sued for rent, and the emphasis of the opinion was on how much he could recover, not when he could recover.

Bradbury v. Higginson[12] was the first of two cases which mentioned anticipatory breach. The court again held that the total rent under the lease was not the correct measure of damages, and that even though the tenant had repudiated, the complaint had not averred that the plaintiff had

[9] 214 Cal. 591, 7 P.2d 697 (1932).

[10] Oliver v. Loydon, 163 Cal. 124, 124 Pac. 731 (1912); Bradbury v. Higginson, 162 Cal. 602, 123 Pac. 797 (1912); Respini v. Porta, 89 Cal. 464, 26 Pac. 967 (1891); Hermitage v. Levine, 248 N.Y. 333, 162 N.E. 97 (1928); Kottler v. New York Bargain House, Inc., 242 N.Y. 28, 150 N.E. 591 (1926).

[11] 89 Cal. 464, 26 Pac. 967 (1891).

[12] 162 Cal. 602, 123 Pac. 797 (1912).

been damaged by the repudiation, nor did the complaint state any facts from which the amount of any such damage could be inferred. Since the plaintiff was bound to allege and prove damages, he could not recover on the doctrine of anticipatory breach. The court indicated that the right of action might arise immediately after the repudiation if the complaint had been properly drawn. Then, in *Oliver v. Loydon,*[13] the court, while citing *Bradbury v. Higginson* as authority when referring to the use of the doctrine of anticipatory breach, held that there had not been a sufficient manifestation of a repudiation by the tenant for the doctrine to apply; the tenant had never surrendered the premises.

The fundamental point decided by these cases was that the landlord could not recover the total rent remaining due under the lease after a repudiation. These cases must have been cited in *Phillips-Hollman* and *Treff* to settle the way damages should be measured, for the question of when the cause of action would accrue was never in issue. But when this point was mentioned, it was intimated that the doctrine of anticipatory breach might apply.

Two New York decisions were used to support the rule stated in *Phillips-Hollman* and *Treff.* Neither of these cases involved anticipatory breach, yet one of them was the primary case used to support the rule that the landlord's right to recovery would arise only at the end of the original lease. In *Hermitage v. Levine,*[14] the tenant was ejected by a summary proceeding after defaulting in his rent. A provision in the lease held the tenant liable for damages sustained through reletting. In the opinion, Justice Cardozo stated two rules which are important in determining whether the use of the anticipatory breach doctrine is proper in lease cases: (1) The deficiency is to be ascertained when the term is at an end.[15] (2) The tenant when ejected ceases to be a tenant.[16]

The first rule is undoubtedly a valid proposition where the parties have expressedly agreed that the lessee shall be responsible for damages resulting from reletting at a lower rent or that he will be liable for future rent less any amount received from reletting. It is obvious that if the measure of damages is to depend on reletting, the calculation will have to come at the end of the term, for it is only then that it can be determined if the premises have been relet at all, and if so whether there was any loss.

What about the lease which contains no provision for the lessee's liability? Cannot the measure of damages provided for in the doctrine of anticipatory breach be used, namely, the present value of the rent remaining on the original term less the reasonable rental value of the property for the same period?

In the second rule, the key word is *ejected.* In *Treff v. Gulko,* the court said that it thought the same rule should apply whether the tenant was ejected or whether he voluntarily abandoned the leased premises.[17] Is there not a difference? When the lessee abandons the property, he manifests re-

[13] 163 Cal. 124, 124 Pac. 731 (1912).

[14] 248 N.Y. 333, 162 N.E. 97 (1928). See also Kottler v. New York Bargain House, 242 N.Y. 28, 150 N.E. 591 (1926).

[15] *Id.* at 338, 162 N.E. at 98.

[16] *Ibid.*

[17] 214 Cal. 591, 593, 7 P.2d 697, 698.

pudiation of the lease. When a tenant has been ejected, it does not necessarily mean he has been ejected because he refuses to carry out the entire agreement. If the lease is so conditioned, he may be ejected for failure to keep the property in repair, or some other relatively minor default.

In any event the *Phillips-Hollman* and *Treff* decisions ostensibly settled the argument concerning when the landlord's right of action will accrue. In 1937, a California Civil Code section was added to the statutes, and in essence it allows the parties to a lease to agree to use the doctrine of anticipatory breach *if* they expressly provide for it in the lease agreement.[18] (If not provided for in the lease, it is questionable whether the doctrine may be used to give the landlord a remedy.)

Gold Mining & Water Co. v. Swinerton,[19] decided in 1943 by the California Supreme Court, was an anticipatory breach case involving a lease. The landlord was allowed to recover for future damages, but the case was distinguished as a mining lease case. The court did cite *Bradbury v. Higginson* as supporting the anticipatory breach doctrine in leases, and it admitted that the weight of authority appeared to support that approach. Yet the court refused to commit itself to a rule concerning "ordinary" leases.

De Hart v. Allen,[20] the latest case on the point to go before California's highest court, does not cast any further light on the subject. The lessor, after the lessee had repudiated, gave the lessee notice that any reletting would be done for the lessee's benefit. The implication is that the contract privity was still intact, and therefore the court properly held that the right of action did not arise until the end of the term.

The question still remains, what are the landlord's remedies in a particular case? It appears that the doctrine of anticipatory breach might possibly be used. At any rate, it does not appear that the doctrine has been expressly rejected in California. The individual factors in a particular case may be controlling. Was the lease drawn so as to not include any reletting damages clause? Did the tenant actually abandon the property and repudiate the lease? Has the landlord not given the tenant notice that he will do any reletting for the tenant's benefit? Can damages resulting from the tenant's repudiation be properly alleged and proved? If so, a decision may be reached in which a California lease might be found to be more a contract and less a conveyance.

*Charles Patterson**

---

[18] CAL. CIV. CODE § 3300: "The parties to any lease of real or personal property may agree therein that if such lease shall be terminated by the lessor by reason of any breach thereof by the lessee, the lessor shall thereupon be entitled to recover from the lessee the worth at the time of such termination, of the excess, if any, of the amount of rent and charges equivalent to rent reserved in the lease for balance of the stated term or any shorter period of time over the then reasonable rental value of the premises for the same period. . . ."

[19] 23 Cal. 2d 19, 142 P.2d 22 (1943).

[20] 26 Cal. 2d 829, 161 P.2d 453 (1945).

* Member, Second Year class.