

## A LANDLORD'S SECRET WEAPON AGAINST DEFAULTING TENANTS

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Under California law, landlords are entitled to receive the total consideration of the lease after a default. However, breaching tenants many times are able to discount the value of the remaining term of the lease by demonstrating that the landlord could have reduced his losses by leasing to someone else or by finding an expert witness to testify that the leasing efforts were less than stellar. At the very least, this issue can often preclude prevailing on a summary judgment motion. Therefore, it is often difficult and expensive for a landlord to be made fully whole after a trial, arbitration or mediation.

There is, however, a little known, yet powerful right under California law that removes any obligation by landlord to mitigate damages if a tenant breaches a lease and voluntarily vacates the premises. While Civil Code §1951.4 shifts the power back to the landlord, this right is subject to certain limitations and landlords need to be aware of this remedy, when it is available, and when it makes sense to use it.

When Civil Code §1951.4 is in play, the tenant cannot argue that the landlord's re-leasing efforts were substandard: The landlord has no duty to mitigate at all. The tenant is therefore faced with the prospect of being liable for the entire lease term with no viable defense. This shift in the balance of power often can induce a defaulting tenant to pay a significant portion of the remaining lease term in exchange for a release of the full lease obligations. A savvy landlord can then re-lease the same property to a new tenant for the same period that he has already received payment from the former tenant.

### Conditions on Use of Section 1951.4

This powerful right is only available under certain conditions. Those conditions are:

- The lease must expressly provide for the availability of Section 1951.4
- The lease must provide the tenant with the ability to assign or sublease with only reasonable (or no) restrictions
- The landlord must not have terminated the tenant's right to possession.

Most commercial leases comply with conditions one and two. The third condition is often the most difficult to satisfy. Landlords can terminate the right to possession by either bringing an unlawful detainer notice, changing the locks, or serving a three-day notice to pay or quit. While terminating possession is often necessary with a defaulting tenant, it is not necessary, or advisable, if the tenant has already left, or is about to do so.

There is a fourth unwritten condition to the use of Civil Code §1951.4 - a solvent tenant. Most tenants abandon property because they cannot afford the rent. This type of tenant is also unlikely to be able to afford to pay a large settlement or judgment. Defaulting tenants who are financially shaky must be evicted, and quickly, so that a new and better tenant can be located and installed.

A solvent tenant, on the other hand, may vacate premises for a variety of reasons: consolidation of several locations, merger of the tenant's company with a competitor or corporate downsizing. When that type of tenant vacates, the landlord must not simply accept a tender of possession or delivery of the keys. Instead, the landlord must make clear, in writing, that it is not terminating the tenant's right to possession, and that the rent will continue to be due every month. If the tenant then fails to pay, a lawsuit for the rent due each month until trial can be filed. The tenant will soon realize that it will be liable for the remainder of the lease term unless it buys out the lease or locates a suitable subtenant - and subtenants are hard to find for the stub end of a lease in default.

A rational tenant in this situation will be anxious to make it worthwhile for the landlord to release them from the entire remaining lease term. A clear letter setting forth the landlord's intention to collect rent as it comes due month after month after month often helps the tenant to see the future of being liable for a space it no longer needs – and try to avoid that ongoing liability. This realization is a powerful incentive for the tenant to offer a deal which puts the landlord in a win-win situation.