



California Court of Appeal Rules No Cost of Repair Damages for Lessee Waste During Pendency of Lease

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The Fourth District Court of Appeal of the State of California recently issued an opinion concerning a landlord's right to recover damages for a lessee's waste in the case *Avalon Pacific – Santa Ana, L.P. v. HD Supply Repair & Remodel, LLC*.¹ The lessee, HD Supply, demolished the office space it leased from Avalon in preparation of renovations, but halted the renovations due to economic conditions, and allowed the property to fall into a state of disrepair. Avalon did not terminate the lease, but sued HD Supply to recover the cost of repair, and was awarded damages for breach of lease and waste by the trial court. The Court of Appeal reversed, and held that Avalon's measure of damages for breach of the maintenance and repair covenants and for waste is the diminution in value of Avalon's reversion interest. The Court also held that Avalon could not recover cost of repair damages when the lease had not been terminated and Avalon was continuing to receive monthly rent.

HD Supply leased premises from Avalon, which included two vacant warehouses, one of which had interior office space, and intended to convert the warehouses into a retail facility. Within months of commencing the build-out, the economy declined. HD Supply halted the renovations, and the premises fell into a state of disrepair.²

Avalon never terminated the lease, and continued to receive monthly rent of about \$50,000, but filed suit for breach of lease (breach of maintenance and repairs covenants), waste and declaratory relief against HD Supply, and the jury awarded \$561,000 against HD Supply.³ On the waste cause of action, the jury found that HD Supply acted "willfully or maliciously" and the trial court trebled the damages for waste, resulting in a total damages award of \$2.36 million.

Cost of Repair Damages for Breach of Maintenance and Repair Covenants are Not Recoverable by a Lessor During the Lease Term

The Court found that HD Supply had not abandoned the lease, which was a prerequisite to Avalon's right to recover cost of repair damages. The Court held that cost of repair damages for breach of maintenance and repair covenants are not recoverable by a lessor during the lease term. Instead, the Court opined that to enforce nonmonetary covenants of the lease, such as maintenance and repair obligations, Avalon's remedy under the lease was to sue for specific performance, which Avalon did not do. The Court noted that the justification for the rule that a lessor may not recover damages for cost of repair during the lease term was that it would not be fair since the lessee is not bound to expend money on repairs, and if a lessor recovered the cost of repairs, the lessor would have a windfall. This is because the lessor would not rightfully come into possession of the premises until the expiration of the lease term, after the value of the repairs has substantially declined. Further, a lessor's cost of repair damages



during the lease term is speculative, since the lessee may make the necessary repairs prior to the expiration of the lease.⁴

The Court recognized that a landlord has a right to enforce a repair covenant during the lease term. But the issue was what *remedy* is recoverable (e.g., specific performance, or damages for cost of repair or injury to reversion interest). The Court discussed several cases allowing cost of repair damages, but noted that those cases turned on peculiar facts or terms in the lease and did not represent the general rule that cost of repair damages are not recoverable during the lease term. The Court noted that there is a split of authority as to whether a lessor can obtain damages for injury to the reversion interest during the pendency of the lease, but noted that it need not decide that issue since Avalon had not sought such damages.⁵

Damages for Waste Must be Based on Diminution of Reversion Interest and Cannot be Based on Cost of Repair While Lease is in Effect

The Court held that Avalon did not prove that HD Supply committed waste, which is by definition injury to a lessor's reversion interest. The Court recognized that not every injury to premises by a lessee constitutes "waste" as waste is injury to the lessor's reversion interest, not the lessee's present interest. While Avalon presented testimony that the premises could not be sold or leased in its present condition, Avalon did not present evidence of damages to Avalon's reversion interest. Therefore the Court concluded that in seeking cost of repair damages instead of proving diminution of value of its reversion interest, Avalon failed to prove waste. Further, the Court questioned a lessor's ability to recover cost of repair damages for waste, holding that Avalon could not have recovered cost of repair damages while the lease remained in effect.⁶ The matter was reversed with directions to enter judgment in favor of the defendants.

Endnotes

1 Case No. G043049 (2/22/11), Super. Ct. No. 30-2008-00105887.

2 *Id.* at pp. 4-7.

3 *Id.* at p. 10. The jury also awarded Avalon \$677,000 against Home Depot for breach of guaranty.

4 *Id.* at pp. 23-24.

5 *Id.* at pp. 28-30.

6 *Id.* at p. 39.

For more information on the matters discussed in *Locke Lord's QuickStudy*, please contact the author:

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