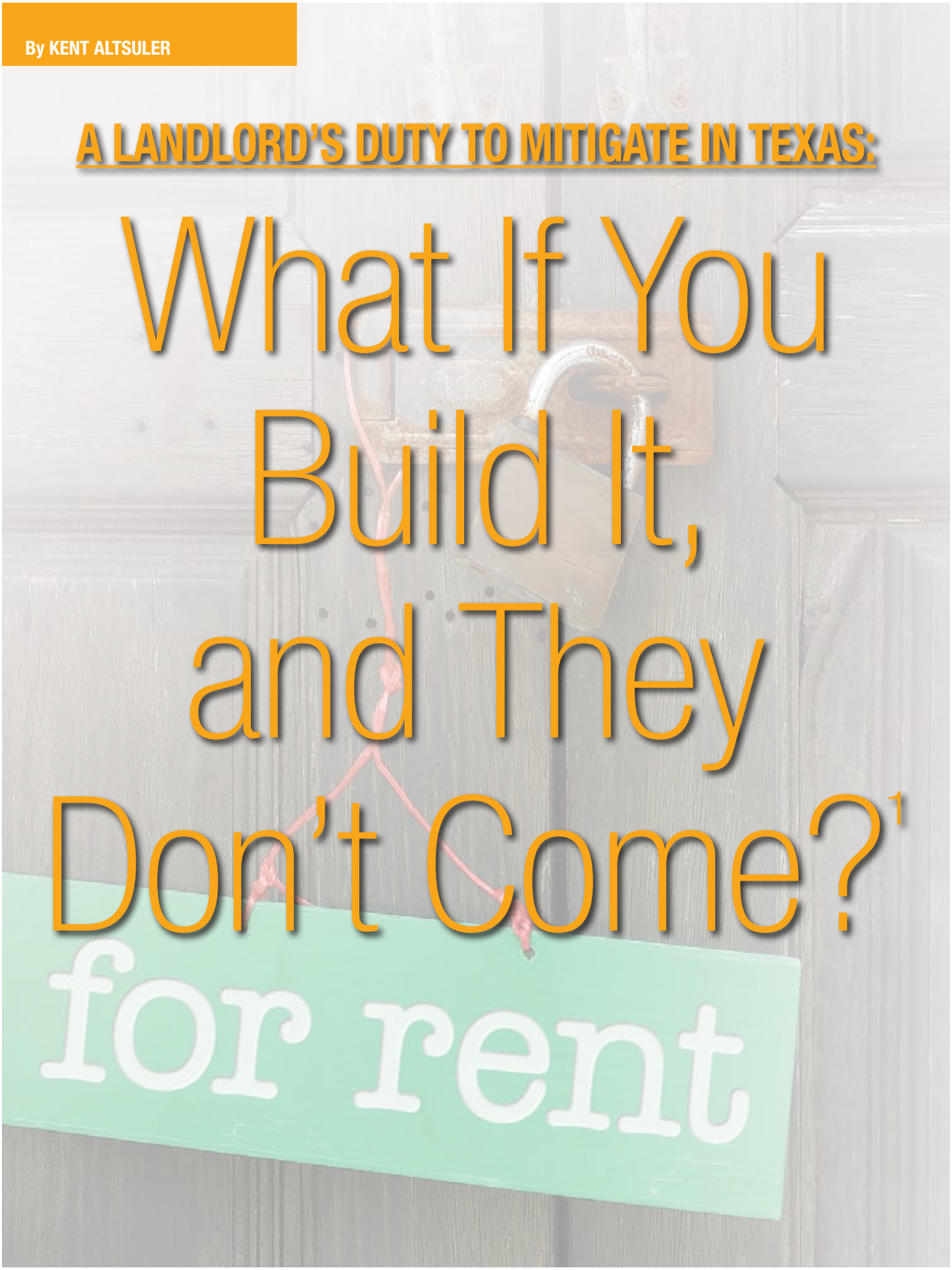
By KENT ALTSULER

A LANDLORD'S DUTY TO MITIGATE IN TEXAS:

What If You Build It, and They Don't Come?[1]



A. Introduction and TEX. PROP. CODE § 91.006

There is no doubt that in Texas a landlord has the duty to mitigate his or her damages when the tenant breaches and abandons. Texas Property Code § 91.006 provides:

(a) A landlord has a duty to mitigate damages if a tenant abandons the leased premises in violation of the lease.

(b) A provision of a lease that purports to waive a right or to exempt a landlord from a liability or duty under this section is void.[2]

To "abandon" a place, one must leave.[3] But what happens if a commercial tenant does not technically abandon the leased premises, and instead never shows up in the first place?

Let's say, for example, a shopping center has a signed long-term lease with a big-box retail anchor tenant. The shopping center developer has already spent a great deal of time and money on design, construction, and negotiations with the city. But right after the structure is built, the tenant informs the landlord that it is not coming, stocking the shelves, staffing up, or opening the store. This is an obvious default under the lease and a breach of the standard clause obligating the tenant to open for business for at least one day. But what is the proper measure of damages for the landlord? Can the landlord argue that he or she has ***no*** duty to mitigate because the tenant never took possession in the first place?

B. *Austin Hill Country*

No Texas case squarely covers this issue. To answer these questions one must piece together (1) language from the above-quoted statute and (2) the results of cases that involve slightly different scenarios.

The starting point is *Austin Hill Country*, the seminal Texas Supreme Court opinion that provoked the passage of Section 91.006.[4] In that litigation, Palisades owned and operated an office complex. Austin Hill Country executed a five-year lease, which was originally estimated to begin on November 15, 1992; but construction came to a halt on October 21, 1992 when Palisades received conflicting instructions about the completion of the suite. After the parties tried to resolve their differences, Palisades sued Austin Hill Country for anticipatory breach of the lease. At trial the latter attempted to prove that Palisades failed to mitigate the damages resulting from Austin Hill Country's breach by rejecting other offers to lease the premises. Palisades won the trial. The court of appeals affirmed.

On appeal to the Texas Supreme Court, Austin Hill Country sought the recognition of a landlord's duty to make reasonable efforts to mitigate damages when a tenant breaches a lease. The court began its analysis by acknowledging that the traditional common law rule dictated that landlords have no duty to mitigate. Texas adopted the rule in 1897. Since then Texas courts have consistently followed the no-mitigation rule in cases involving past rent. But some Texas courts required a landlord to mitigate when he sought a remedy that was contractual in nature (like anticipatory breach), or when he reentered the premises. Recognizing that a lease possesses elements of both a contract and a conveyance, and that public policy justifies the duty to mitigate, the court held the following:

(1) a landlord has a duty to make reasonable efforts to mitigate damages when the tenant breaches the lease and abandons the property;

(2) the landlord's duty to mitigate requires him to use objectively reasonable efforts to fill the premises when the tenant vacates in breach of the lease; and

(3) the landlord is not required to simply fill the premises with any willing tenant; the replacement tenant must be suitable under the circumstances.[5]

C. Opinions Issued Since *Austin Hill Country*

After *Austin Hill Country* the question remained: Is an abandonment of the premises necessary for the mitigation duty to kick in? Some decisions since *Austin Hill Country* glossed over the abandonment precondition in Section 91.006.

In *Western Skies Partnership/Physician's Healthcare Assocs., L.C. v. Physician's Healthcare Assocs., L.C.*, a dispute arose over a commercial lease.[6] The lease was signed by Western Skies (the landlord) and PHA (the tenant) on March 15, 1994. Because the property needed remodeling, PHA was not obligated to occupy the premises until 120 days after the premises became available. Western Skies did not hire anyone to do the improvements until April 27, 1994. In May 1994, Western Skies suspected that PHA was not going to move into the premises, and in July 1994, the broker informed Western Skies that PHA indeed was not going to occupy the premises. To replace PHA, the broker presented a proposal from a Kenny Rogers Roasters franchise to sublease the premises. Instead, Western Skies entered into a new lease with SouperSalad and then filed a lawsuit to recover damages caused by PHA's breach. The jury found that both sides breached and did not award any damages. On appeal Western Skies argued that the trial court erred in admitting evidence of mitigation because it was irrelevant. As an extension of this argument, Western Skies argued that the following jury instruction

was improper:

> Do not include in your answer any amount that you find Western Skies could have avoided through reasonable efforts to mitigate its damages.
>
> You are instructed that a landlord has a duty to make reasonable efforts to mitigate damages when the tenant breaches the lease **and abandons the property**.

Even though the concept of abandonment was mentioned in the jury charge, the body of the opinion stated only that a landlord has a duty to make reasonable efforts to mitigate damages when a tenant "defaults on the lease." In other words, the El Paso court ignored the fact that the tenant never moved in, and overruled Western Skies' assertion.[7]

In another matter involving a 1994 lease, Health United rented office space from GFIC Management, an agent for the landlord, Frontier Land.[8] Because of problems with a doctor at the medical facility, Health United never took possession of the premises. GFIC filed suit in July 1995 and won. On appeal Health United contended that GFIC failed to mitigate its damages because the premises remained vacant from November 1994 through May 1996.[9] The appellate court stated:

> Since [*Austin Hill Country*] it has been the law in Texas that "a landlord has a duty to make reasonable efforts to mitigate damages when the tenant breaches the lease and abandons the property, unless the commercial landlord and tenant contract otherwise"[10]... The duty to mitigate requires the landlord to use "objectively reasonable efforts' to fill the premises **when the tenant breaches the lease**."[11]

The fact that the tenant had never taken possession did not relieve GFIC from its mitigation duty, or alter the court's analysis.

Finally, the most helpful case on this topic may be *Broken Spoke Club, Inc. v. Butler*.[12] There, Butler (the landlord) agreed to lease the subject premises to the operators of the Broken Spoke Saloon for three years. The term was supposed to run from February 1998 through January 31, 2001. Although the tenant did occupy the premises from 1998 to 2000, *Broken Spoke* still offers guidance because the saloon did not breach and abandon in the normal fashion: the building burned down. Much of the opinion discusses the amount of offset the tenant was entitled to in light of rent received from substitute lessees during the term of the original lease, as opposed to whether the tenant is entitled to a mitigation offset at all. This is telling because nowhere in the decision does Justice Gardner, who cites both *Austin Hill Country* and Section 91.006, relieve Butler from the obligation to mitigate. The fact that the tenant failed to pay rent (and did not come back after the fire) was enough to trigger the duty to mitigate.[13]

D. Conclusion

Although no case directly addresses the issue of whether a commercial landlord has a duty to mitigate when the tenant never shows up, it is clear that the main policy underlying mitigation is to avoid waste.[14] Texas law—like nature—abhors a vacuum when it comes to commercial space.[15] Thus, no matter what created the emptiness out of premises that are under a lease, it is the duty of the landlord to make reasonable efforts to fill it.

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Endnotes

1. Adapted from a line in the 1989 movie "Field of Dreams."
2. 2. TEX. PROP. CODE § 91.006 (effective September 1, 1997) (emphasis added). Section 16(a) of Acts 1997, 75th Leg., ch. 1205, provides, "Section 91.006, Property Code, as added by this Act, applies only to a lease entered into on or after the effective date of this Act." A statutory duty to mitigate is imposed on commercial landlords only in Texas and five other states. Milton R. Friedman, *Friedman on Leases*, Chapter 16 (2010). *Compare* TEX. PROP. CODE § 91.006 *with* 735 ILCS 5/9-213.1 (Illinois) ("After January 1, 1984, a landlord or his or her agent shall take reasonable measures to mitigate the damages recoverable against a defaulting lessee.") (emphasis added).
3. *Webster's New World Dictionary* 2 (2d College Ed. 1980).
4. *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293 (Tex. 1997).
5. *Id.* at 295-99.
6. *Western Skies P'ship/Physician's Healthcare Assocs., L.C. v. Physician's Healthcare Assocs., L.C.*, 2004 WL 1078491, at *1 (Tex. App.—El Paso 2004, no pet.).
7. *Id.* at *1-2. *See also Aero DFW, LP v. Swanson*, No. 2-06-179-CV, 2007 WL 704911, at *4 n.4 (Tex. App.—Fort Worth 2007, no pet.) (mem. opinion) (not designated for publication) ("Section 91.006 of the Texas Property Code requires a landlord to mitigate his damages after the breach of a lease and declares void any lease provision to the contrary") (emphasis added); *but compare Hoppenstein Props., Inc. v. Schober*, No. 02-09-00312-CV, 2010 WL 4676938, at *2 (Tex. App.—Fort Worth 2010, no pet. h.) ("A landlord has a duty to make reasonable efforts to mitigate damages when the tenant breaches the lease and abandons the property") (emphasis added).
8. *Health United Family Care, Inc. v. GFIC Mgmt., Inc.*, No. 01-98-01195-CV, 2001 WL 395004, at *1 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (not designated for publication).
9. *Id.* at *1-6.
10. Section 91.006(b) eliminated this option for contracting parties: "A provision of a lease that purports to waive a right or to exempt a landlord from a liability or duty under this section is void."
11. Health United Family Care, Inc., 2001 WL 395004, at *6-7 (emphasis added).
12. *Broken Spoke Club, Inc. v. Butler*, No. 2-02-116-CV, 2004 WL 1858119 (Tex. App.—Fort Worth 2004, no pet.) (mem. opinion) (not designated for publication).
13. *Id.* at *1-3.
14. *Hoppenstein Props., Inc.*, 2010 WL 4676938, at *2.
15. The quote "Nature abhors a vacuum" is attributed to the philosopher Baruch Spinoza.