

Rent Acceleration Clauses in Kentucky Commercial Real Estate Leases

Heavy Cudgel in a Landlord's Toolbox or "Paper Sword?"

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A well-drafted commercial lease provides several remedies for the landlord after a default by the tenant. Landlord remedies frequently include eviction and damages for lost rentals and costs of reletting the leased premises. Further, such remedies may include rent acceleration, allowing the landlord to collect all rent (base rent, real estate taxes, common area maintenance, insurance, etc.) that would be due for the remainder of the term. There is not a uniform American rule on the enforceability of these rent acceleration clauses. Accordingly, landlords and tenants (and their respective counsel) may not know whether rent acceleration clauses are enforceable in their respective jurisdiction.

Under Kentucky law, damages for breach of contract should place a plaintiff in the position it would have been in if the contract had been fulfilled—awarding a sum which is the equivalent to performance of the bargain. “[T]he measure of damages for breach of contract is ‘that sum which will put the injured party into the same position [they] would have been in had the contract been performed.’” *Hogan v. Long*, 922 S.W.2d 368, 371 (Ky. 1995). In this article we will focus on rent acceleration clauses as contractual damages. Do rent acceleration clauses place landlords in the position they would have been in if the tenant

did not breach the lease, or do they overstep their intended purpose? Are they enforceable under Kentucky law?

One early Kentucky case involving rent acceleration is *Jordan v. Nickell*, 253 S.W.2d 237 (Ky.Ct.App.1952). *Jordan* involved a commercial tenant that vacated the leased premises four years prior to the expiration of the term. The landlord sought to recover the entirety of the rent for the remainder of the term in an accelerated sum, arguing that acceleration was permitted under Kentucky’s common law doctrine of “anticipatory breach.” *Id.* at 239. The *Jordan* court drew a distinction between damages (i) in the event the lease was “forfeited” and the landlord re-entered the leased premises, and (ii) in the event that tenant “abandoned” the leased premises.

In the case of a “forfeiture,” the landlord would have a duty to mitigate its damages. In the case of an “abandonment,” the landlord would have no duty to mitigate its damages, because the tenant’s wrongdoing would not impose a duty on the landlord. Ultimately, the court in *Jordan* ruled that despite the tenant’s “abandonment” of the lease, it would not award rent acceleration because the lease provided for rent payments on fixed due dates. In *Jordan*, the Kentucky Court of Appeals

held that a landlord may only collect rents as they become due where “...the due dates of such payments are definitely fixed by the contract.” *Id.* at 239.

The Kentucky Court of Appeals further examined rent acceleration in *Nohr v. Hall’s Rental, LLC*, 2013 WL 462004 [unpublished] (Ky.Ct.App.2013). In *Nohr*, a tenant defaulted under a commercial lease which did not include a rent acceleration clause. Unlike the tenant in *Jordan*, this tenant did not “abandon” the leased premises. Instead, the landlord repossessed the leased premises through legal process. *Id.* at *1. The *Nohr* court stated that specific language in the lease which provided that the landlord could “recover all rent and damages accrued and accruing under this lease” clearly included future rent payments as part of landlord’s potential damages. *Id.* at *2. The *Nohr* court, however, concluded that the landlord had a duty to mitigate its damages, and was not entitled to collect all future rent in one lump sum payment, because the lease did not specifically provide for rent acceleration. *Id.* at *4. The *Nohr* court based its ruling on the absence of an acceleration clause in the lease, while the court in *Jordan* focused on the fixed rent payment dates in the lease along with equitable principles.

More recently, in *Anyconnect US, LLC v Williamsburg Place, LLC*, 636 S.W.3d 556 (Ky.Ct.App.2021), the Kentucky Court of Appeals again held that after a tenant default, a landlord was entitled to recover future rent under the lease, but only when it became due and payable by the tenant under the lease. In *Anyconnect*, the tenant failed to pay rent and vacated the leased premises, and landlord retook possession. The landlord attempted to relet the space but was unable to find another tenant. *Id.* at 562. The lease at issue did not include a rent acceleration clause. *Id.* at 564. The court specifically noted in footnote 6 that, “Prior to the expiration of the lease’s term however, landlord was entitled to recover rental payments as they became due under the lease because there was no acceleration clause in the lease.” *Id.* at 564. It is unclear how the *Anyconnect* court would have ruled had the lease in question provided for rent acceleration after default.

To summarize, there is no specific Kentucky case law that analyzes a clear rent acceleration clause after a lease default. Three Kentucky cases discuss rent acceleration in leases that did not include specific rent acceleration provisions, and in those cases, the courts only allowed the landlord to recover rents as they became due. (Continued on next page)

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Federal courts have also occasionally discussed rent acceleration under Kentucky law. In *G.D. Deal Holdings, Inc. v. Baker Energy, Inc.*, 501 F.Supp.2d 914 (W.D.Ky.2007), a federal court interpreting Kentucky law permitted a landlord to collect accelerated rent, discounted to present value. In *G.D. Deal*, a landlord and tenant entered a multi-location lease. The tenant subsequently defaulted under the lease and declared bankruptcy, and the lease was rejected in bankruptcy. *Id.* at 924. The landlord's lender foreclosed on the real estate, preventing the landlord from mitigating its damages by reletting the leased premises. *Id.*

The lease in question permitted the landlord to recover the total remaining rent payments (with a discount factor of 12%) less the present value (also discounted by 12%) of the "fair market rental value" for the leased premises for the remainder of the lease term. *Id.* at 922. The court permitted the landlord to recover the entire present value of the remaining rent payments without subtracting the fair market rental value of the leased premises due to the landlord's preclusion from mitigating its damages. *Id.* at 924. The court assumed the enforceability of the rent acceleration clause as written. Importantly, the court held that discounted rent acceleration did not constitute "liquidated damages" subject to potential equitable reduction, because (i) the lease did not specify a set amount of damages agreed upon by the parties, and (ii) the actual damages would not be difficult to ascertain, if not for the bankruptcy proceeding. *Id.* at 923.

G.D. Deal Holdings has not spawned a progeny of federal cases enforcing rent acceleration in Kentucky. In a more recent unpublished decision, a federal court declined to accelerate rent, holding that "...[landlord] is only entitled to such damages as the rental payments become due..." *Fayette Middle Anchor, LLC v. Kinnucan Enterprises, Inc.*, 2019 WL 6684502, at *4 [Not Reported Fed Supp.] (E.D.Ky.2019). The lease in *Fayette* did contain acceleration language, but limited acceleration to "all current and that portion of future rent and other monetary obligations due hereunder which exceeds the fair market value of such rent." *Id.* at *3. The *Fayette* court stated that, despite the lease language allowing immediate recovery for a portion of rents, a landlord "cannot recover for rental payments that have yet to become due because the alleged harm... has yet to occur" *Id.* at *4.

In conclusion, there is limited published Kentucky precedent analyzing leases with clear rent acceleration language. In leases without clear rent acceleration language, Kentucky courts generally have only allowed a landlord to collect rents when due, after subtracting potential mitigation recovery to the extent the landlord is required or able to mitigate its damages.

The limited Kentucky precedent on rent acceleration makes drafting leases more difficult for a landlord's attorney. It is not entirely clear when rent acceleration is enforceable, and

attorneys will have to gauge how to strike a balance between being aggressive for their clients and setting realistic expectations as to enforceability. Providing a landlord with multiple optional remedies could maximize a landlord's potential recovery upon default. A careful attorney might provide a landlord the option of (1) accelerating rent, discounted to present value (and potentially, less the discounted fair market rental value of the leased premises, accounting for reletting costs, brokerage fees and vacancy), or (2) collecting rent as it becomes due under the term of the lease, less any recovery of rents after the landlord's reasonable efforts to relet the space, but subtracting from such substitute rents all attorney's fees, broker fees and other costs of reletting.

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MEETING SCHEDULE

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The monthly chapter meeting of the KY Association of Legal Administrators will be held in person on Thursday, April 13 beginning at 11:45 a.m. at the office of Frost Brown Todd in Louisville (400 W. Market St., Ste. 3200); and Lexington (250 W. Main St., Ste. 2800). Guests are welcome to join us for lunch. RSVP to Tina Kirkland, tkirkland@fbtlaw.com, no later than Wednesday, April 12. ■

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