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What are a commercial tenant's rights if a landlord fails to maintain the leased premises? - by Allison Fleet

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Across the country states have enacted laws protecting tenant rights under residential leases. Unfortunately, commercial tenants generally do not enjoy the same protections and rights as residential tenants. Unless specifically negotiated in a commercial lease, standard residential tenant protections such as the implied warranty of habitability and a landlord's duty to re-let are not commonly found in commercial leases. This begs the question: what are a commercial tenant's rights if a landlord fails to maintain the leased premises?

Commercial tenants may be able to employ a constructive eviction defense in situations where a landlord's egregious, and intentional, act (or failure to act) substantially and permanently interfered with the tenant's use of its leased premises. Upon a finding of constructive eviction a tenant may terminate its lease and be relieved from its obligation to pay rent. Unfortunately courts are not always willing to make a finding of a constructive eviction as it can be difficult for commercial tenants to prove that the landlord caused the defects which made their leased premises permanently untenable for the intended purpose. For example, in *Sims v. Mason*, 361 Mass. 881 (1972), the court held that although the Landlord had breached its obligations under the lease, the Landlord's failure to make promised improvements, provide proper cleaning services and furnish suitable heating and air conditioning did not amount to constructive eviction.

However, courts in Massachusetts have held that a commercial landlord does in fact have a duty to repair unsafe conditions following receipt of written notice of such condition, even if no specific duty is set forth in the lease. In *Bishop v. TES Realty Trust*, 459 Mass. 9 (2011), the court held that M.G.L. c. 186 §19 was applicable to commercial landlords, and went further to state that a landlord could not waive such duty in a lease.

In practice, instead of relying on a constructive eviction defense commercial tenants are best served by negotiating certain rights and protections into their lease. Commercial tenants should negotiate the right to rent abatement upon any extended failure by the landlord to supply required utilities or to

promptly comply with landlord covenants and conditions in their lease. Additionally, commercial tenants should negotiate the ability to perform obligations of the landlord following landlord's failure to do so within the time frame set forth in the lease, and to withhold the reasonable cost of such performance from their rental payment.

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