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COMMERCIAL LEASE NEWSLETTER

PART III

**COMMERCIAL LEASE AUDITS IN REGARD TO COMMON AREA
MAINTENANCE CHARGES**

Lease Audit: As indicated in the prior section of this article the calculation and allocation of lease expenses, especially when it also includes an escalation clause, becomes complicated. Errors of omission or commission sometimes occur (both by commercial landlord and commercial tenant) and these errors need to be identified with particularity. One way to do so is for a tenant to turn to a commercial lease audit. Commercial lease Audits are prepared by various companies specializing in such services. In such cases, these lease audit specialists first review the legal instruments between the parties and then identify the specific cost items which form the basis for the calculation and allocation of common are rent pass throughs, and a annual escalation clause in particular. The focus on most lease audits is to identify the errors which occur in commercial lease payments in regard to both identification and calculation of expenses and pass throughs. Sometimes fundamentally the lease audits discover that their errors occurred due to the inclusion of expenses that fall outside the scope of “normal repairs maintenance and operations”.

Often times the “management fee” for the operational expenses include fees such as the hiring of an onsite manager whose primary goal is to procure new tenants for the location. Other areas that lease audits can identify are expenses for items such as financing costs, ownership costs, building depreciation or capital improvements which should not be passed through as a specific operational expense of the center. There also has to be a full and thorough review of the lease which identifies the “base year” of the lease. As such, any appropriate audit should be conducted and identified early in the term of the lease to establish a base line from the standpoint of operational expenses and identification since errors can be compounded if not identified early on.

It is also important to note that if lease errors are overlooked (and this is applicable both to the commercial landlord and commercial tenant), in certain cases those commercial lease errors can be considered waivers. Again, under certain circumstances, the waiver can amount to a legal defense for the enforcement of future actions based upon the theory

of waiver (see discussion below Miracle Center Associates v. Scandinavian Health Spa, Inc. 889 So. 2d 877 (3rd DCA 2004)).

In the Miracle Center Associates v. Scandinavian Health Spa, Inc. case the facts disclosed that in each calendar year from 1989 to 1999 (a ten year period) the landlord delivered to the tenants written estimates of the proportionate share of common area costs showing the gross floor area of the tenant space at 27,935 square feet and the total leasable floor area of the center at 182,072 square feet. This established the tenant's proportion share of the common area cost as being calculated as 15.34% (27,935 square feet of lease space as the numerator with 182,072 square feet as the denominator) which is a consistent formula based upon the assumed facts accepted by both the landlord and tenant and acted upon by the landlord in initiating and sending a full ten years of lease bills. However, after a suit was initiated, surprisingly by the tenant, the landlord filed a counterclaim alleging that during such ten (10) year period and as a result of a computer generated error; the landlord has inadvertently failed to conclude 31,940 square feet in a proportionate shared calculation.

Based upon the facts of the initial case, this was a running track which was not included in the leasable space calculation. In that particular case, the omission and self admitted error by the landlord cause the landlord itself to lose the ability to collect that rent during the period of time when it failed to properly bill the tenant. The Court identified again the issue of waiver citing Torres v. K. Site 500 632 So 2d 110,112 (3 DCA 1994) in which the appellate court indicated "a party may waive any rights to which he or she is legally entitled, by actions of conduct, warranting an inference that a known right has been relinquished."

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