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COMMERCIAL LEASE NEWSLETTERS

Options to Renew and Holdover Tenants
Exposure of Commercial Landlord
For claims by Subsequent Tenant

In several previous newsletters (March and April, 2007), we talked about the form and content of an option renew and first right of refusal.

Many landlords have leases in which tenants either have an option to renew or have an interest in renewing their lease. There are also numerous circumstances in which a tenant is unable to make a decision to relocate the premises and ends up “holding over” after the initial lease term ends.

A “Holdover Tenant” is defined as a tenant who remains in occupancy of the subject premises after the initial lease term and without the written consent of the landlord and without a written extension of the lease agreement. As such and per Florida Statute §83.04, the Tenant has a Tenancy by Sufferance.

Pursuant to Florida Statute §83.04 a Holdover Tenant can become a tenancy at will by payment of rent accepted by the landlord. The term is predicated on how the tenant renders payment. Normally payments are made on commercial leases on a monthly basis. In the event that a tenant holds over after the end of his lease without the written extension of the lease by the landlord (and barring any conduct or representation of the landlord which would indicate anything but a holdover situation) but the Landlord and Tenant agree that Tenant can pay monthly rent on a monthly basis; the Tenant is considered a “month-to-month” tenant.

Pursuant to Florida Statute §83.03 a month-to-month tenant has occupancy for that particular month with the landlord having the ability to terminate the month-to-month tenancy by providing the tenant 15 days notice prior to the expiration of the then existing monthly lease period to terminate such lease.

Generally this situation does not result in a problem for the landlord. However, there does occur a situation in which the landlord can have exposure for damages to a prospective tenant who the landlord has entered into a lease agreement to take occupancy of the premises. The example of such a situation is as follows:

- a) Lease agreement ends June of 2008.
- b) The tenant under such original lease, (“Original Tenant”)(whose lease expires June 1, 2008) has not exercised any option to renew, nor has the tenant indicated its willingness to stay over.
- c) The landlord based upon the fact that the Original Tenant has not agreed to an extension of the lease agreement or exercised any option to renew solicits and obtains a third party tenant to take occupancy (“Subsequent Tenant”).
- d) The Subsequent Tenant’s possession and occupancy is to commence June 1, 2008 coinciding with the Original Tenant’s vacation of the subject premises.

A problem could arise in the event that the Original Tenant fails to vacate the subject premises. Florida Statutes §83.06 does provide that the landlord is entitled to double the rent for any holdover tenant remaining in occupancy after the expiration of the lease. The Statute specifically indicates as follows:

“83.06 Right to demand double rent upon refusal to deliver possession.--

(1) When any tenant refuses to give up possession of the premises at the end of the tenant's lease, the landlord, the landlord's agent, attorney, or legal representatives, may demand of such tenant double the monthly rent, and may recover the same at the expiration of every month, or in the same proportion for a longer or shorter time by distress, in the manner pointed out hereinafter.

(2) All contracts for rent, verbal or in writing, shall bear interest from the time the rent becomes due, any law, usage or custom to the contrary notwithstanding.

This does not address however the fact that the landlord could face exposure to the Subsequent Tenant if Original Tenant does not timely vacate.

Utilizing the same example, assume that the Subsequent Tenant is prepared to commence build out and operations at the premises effective June 1, 2008. Subsequent Tenant may have arranged for move out, build-out and anticipates commencing occupancy and generating income at the new premises operating its business effective June 1, 2008.

However, if the Original Tenant holds over, this precludes the Subsequent Tenant from taking occupancy until the landlord can regain possession. This may require the landlord to make demand for possession of the premises and further initiate an eviction action. In this particular case, the remedy of the landlord claiming double the rent may not be sufficient to protect the landlord from a claim by the Subsequent Tenant who may incur general and special damages a

flowing from the fact that the landlord does not provide the Subsequent Tenant with possession of the premises effective June 1, 2008.

A way for the landlord to protect itself from such situation is to provide in the lease with a Subsequent Tenant the following provision, specifically identified in the written lease agreement between landlord and Subsequent Tenant:

“The Landlord and Tenant agree that there is No liability of landlord for failure to provide possession of premises if landlord is unable to get possession of the demised premises to Tenant on the date of commencement of the lease agreement, because of a hold over or retention of possession by the existing tenant at the subject lease premises. Further, should the landlord have not completed any work required to be performed by landlord to enable Tenant to take possession of the premises, Landlord is not subject to any liability to Tenant for failure to provide occupancy on that particular date. Under such circumstances, the Tenant shall not be obligated to make lease payments and in such event landlord shall use diligent effort to provide possession of the premises to the tenant, which may include the requirement of the landlord to initiate legal proceedings against any holdover tenant or to pursue a diligent effort to complete landlord’s work.”

This clause covers the issue of a holdover tenant and also has a provision which protects the landlord in the event of any delayed build-out required by the landlord.

By placing this provision in the lease of course, this not only protects the landlord but also calls the Subsequent Tenant’s attention to the fact that such holdover status of the existing tenant is a real possibility which puts the Subsequent Tenant on notice of such possibility which is generally outside the landlord’s control.

In situations like this, the landlord, unless the tenant specifically provides notification that it is holding over after the term, actually wouldn’t have a cause of action until the lease would have concluded. The Original Tenant would not be in breach since the lease normally would state that the tenant is entitled to the possession of the subject premises only after the lease term ends. Only after the tenant takes action by its conduct or potential notices to indicate that it is holding over would there be a claim by the landlord to seek assistance of the court to regain possession of the premises.

Based upon the above and foregoing, landlord’s attention is directed to provide such notification in its’ lease when the landlord anticipates having a Subsequent Tenant take possession and occupancy of the premises immediately following the then existing tenant’s lease term since under those circumstances the landlord will be entering into a lease with a Subsequent Tenant to surrender possession of the premises when landlord itself has not regained possession of those premises and will not until the existing tenant vacates.

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