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**COMMERCIAL LEASE NEWSLETTERS**

**Exclusivity Clauses and Use Clauses:**

**I. Confusion among the Courts, Tenants and sometimes Commercial Property Managers**

The next two monthly newsletters are going to be designed to address exclusivity clauses and use provisions in commercial leases, which generally impact and effect retail but could also be important in the issue of tenants as to other commercial premises.

**II. Definition of Exclusivity Clause and Use Clause**

A. In commercial leases it is important to start with the initial basic fundamental definition of these two particular concepts:

- 1) Exclusivity Clause - An exclusivity clause or exclusivity provision contained within a commercial lease is a provision which indicates that the tenant is granted, contemporaneous with the lease agreement, the right for certain identifiable uses at the subject premises generally and as within the complex, shopping center or development.
- 2) Use Provision - A use provision is a provision contained in the lease agreement which specifically identifies the use that is permitted by the landlord and can be inclusive or very restrictive depending upon the intent of both the commercial landlord and the commercial tenant.

B. Confusion as to the rights arising under both provisions.

Sometimes commercial tenants as well as commercial property managers/landlords confuse these two items. It is important to know that in an exclusivity clause, these are additional rights granted solely and exclusively to the tenant allowing a tenant the sole and exclusive right to be utilized those specific and identifiable uses for the tenant. In exclusivity clauses it is very important for the tenant as well as the landlord to have exact and precise language contained in the exclusivity clause. (see initial January 2007 letter relating to precise language contained in leases)

Commercial landlords and tenants fail to recognize the fact that the enforceability of the exclusivity clauses, in the event of any dispute existing between the commercial landlord, the tenant with the exclusivity provision and a competing tenant (who may be the object of a claim for interference with a tenants' exclusivity provision) will fall directly to the Trier of Fact, which is generally the court and also most likely in a preliminary injunction setting. In this particular provision the person seeking to enforce the exclusivity provision needs to establish to the Court that the provision is clear, unambiguous and that the person is entitled to the equitable relief of a preliminary injunction. Preliminary injunctions generally are granted only when the movant (as in this particular the commercial tenant seeking to enforce his exclusivity provisions either against the landlord or the competing tenant) can demonstrate the following four factors:

- 1) Substantial relationships with specific prospective or existing customers or clients
- 2) Trade secrets or valuable confidential business or professional information that does not otherwise qualify as trade secrets
- 3) Customer good will associated with a specific market area
- 4) Trade secrets, as defined in s. 688.002(4).

As such it is very important that the language is clear, unambiguous and identifies with particularity the exclusivity provision that the tenant believes it can obtain.

**III. When is a bagel not a donut?**

Although this seems somewhat flippant, the question was answered in the Court in the case of LPI/KEY West Associates, Ltd. v. Sarah Luna, Inc., 749 So.2d 564., (FLA 2000). Specifically in the case of LIP/Key West Associates, the tenant had an exclusivity provision indicating that it would solely and exclusively have the right to utilize its premises for a "bagel bakery" located in a shopping center.

The exact terminology was in fact "bagel bakery" rather than terminology which the tenant believed to be all encompassing underneath "bagel bakery" which would include the sale of bagels, donuts and the like.

Dunkin Donuts was granted a lease at the premises and the tenant challenged the exclusivity provision claiming that the tenant solely had the right to operate a bakery at the premises and that Dunkin Donuts should be precluded from utilizing the premises to sell its goods which include, but are not limited to, bagels and donuts.

The Trial Court and the Appellate Court disagreed claiming that an exclusivity clause must be drafted to specificity and identified clearly what rights are exclusive to the tenant and what rights are not. In that particular case the tenant's interest was frustrated and the tenant was then faced with competition from a national retailer in the very same premises in which the tenant was operating its' "bagel bakery". Obviously in this particular case the lesson was well learned that: an exclusivity clause must be specific and definite to be enforceable.

#### **IV. Those rights not precluded must be allowable.**

The Courts are very supportive of the fact that exclusivity clauses should not be liberally construed since its intent is to limit prospective use of real property which flies in the face of basis tenet under Florida Law which is a restriction on alienation. As such and in the case of LIP/Key West Associates, the Court identified the fact that a specific identifiable exclusivity case as held by LIP/Key West Associates would eliminate the ability of a competitor Southernmost Donut Co., Inc., from selling its wares in competition with the retailer LIP/Key West Associates, who had the exclusive provisions.

In short, please refer to the case since it has a comprehensive identification of the exclusivity provisions which were ruled upon by the Court which exclusivity provisions were clear, definite and all encompassing.

#### **V. Summary**

The key point in identifying the exclusivity provisions is that in the event that commercial landlord or commercial tenants want to carve out the sole and exclusive use of its premises for an identifiable use which would ultimately preclude any and all other third parties from utilizing premises located in the same building/shopping center/complex in competition with that tenant, that exclusivity clause must be clear unambiguous and specific as to each and every detail otherwise the tenants "exclusive rights" will be construed only to what is exactly identifiable in such clear and uncertain terms as set forth in the lease agreement.

**NEXT MONTH:** The use provisions under a lease and the issues relating to commercial landlords and tenants for granting clauses and interpreting such use provisions.

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