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**COMMERCIAL LEASE NEWSLETTERS**

**The Rights of the Tenant to Assign a Commercial Lease**

One question that is often asked by the landlord is whether the landlord has to consent to the assignment of lease by a tenant.

This often comes up when a tenant is interested in selling its business or alternatively, the tenant simply wants to be relieved of the obligation of the lease and a third party is interested in taking over the space. There have been many instances in which a landlord simply refuses to allow for the assignment not wanting to allow the tenant to transfer the interest in the lease to a third party. Oftentimes the landlord is totally wrong on this particular point, which results in the Landlord being exposed to a damage claim and attorney fees by the tenant.

**I. Assignment of Lease v. Subletting**

There is a distinction between a sublease and an assignment of lease. By definition a sublease is a situation in which the tenant enters into a lease with a sub-tenant for all or part of the premises being occupied. Generally, the initial tenant remains liable on the lease and controls the nature and extent of the use of the premises. By contrast, an assignment of lease is where that same tenant would assign all right, title and interest under the lease agreement to the new tenant who would then have 100% of the contractual rights under the original lease. The latter situation is generally utilized in sales transaction since the purchaser of the business wants to have all rights of entitlement that the original business owner/tenant had. Oftentimes the lease agreement indicates that either (a) the tenant can not sublease or assign the lease without the expressed written consent of the landlord or contains a more appropriate clause or (b) that the tenant cannot assign or sublease the tenant without the written consent of the landlord which consent will not by unreasonably withheld. The language “unreasonably withheld” is the key point in this discussion.

## II. Assignment Rights of the Tenant

Amazingly up until 1980 apparently there wasn't a definitive published case in Florida whether a landlord could preclude the tenant from assigning or subleasing the subject premises or whether the landlord could arbitrarily refuse to consent to such assignment. This issue was clarified by the case of *Fernandez v. Vasquez*, 397 So. 2d 1171 (3 DCA 1981) which adopted the "Good Faith and Commercial Reasonable Rule" involving commercial leases in Florida. In such case the Court felt that in situations where a tenant is attempting to assign the lease, the landlord may withhold consent, but can only do so in a reasonable manner. The Court indicated that the landlord may not arbitrarily refuse consent to an assignment of a commercial lease, but must use Good Faith and Commercial Reasonableness.

Some of the factors that the Court identifies in the *Fernandez* case (which is still good law today-see discussion below of recent case law) is that the trier of fact, (be it judge or jury), can apply the following standards of Good Faith and Commercial Reasonableness:

- (A) The financial responsibility of the proposed subtenant or assignee.
- (B) The identity or business character of the subtenant or assignee. (That is the suitability for the particular building or premises).
- (C) The need for alterations of the premises.
- (D) The legality of the proposed use.
- (E) The nature of the occupancy. (That is office, factory, clinic, etc.)

The Court in *Fernandez* held that a landlord is not going to be required to allow one tenant to be relieved of their obligations by assigning it to a third party tenant who is materially altering and changing the use of the facility or is financially not as sound as the original tenant.

An example of this would be, Tenant A, who is occupying premises for a hardware store and is a solvent and operating an ongoing business. In such a situation a landlord could reasonably withhold consent if that hardware store owner decides to assign the lease to a third party who is financially inferior to the original tenant and intends to modify the use of the premises. (For example: operating an X-Rated book store which would modify the existing use, as well as potentially raising some questions of legality) as well as the fact that the premises would be physically modified to accommodate such use.

In this situation a landlord could reasonably refuse consent although an argument could be made by the tenant that the original tenant would nonetheless still remain liable under the lease (unless the tenant was released of further obligations) and therefore the only question is the intended use and if a certificate of occupancy was granted for such use.

These questions need to be based upon factual analysis. It is critical in situations in which a landlord intends to block the assignment that the landlord is well aware of the Commercial Reasonable Rule and if any questions arise, consult with a qualified Real Estate Attorney.

A recent case involving this very factor and was just decided in the State of Florida (April 20, 2007) in the case of *Speedway SuperAmerica, LLC. v. Tropic Enterprises, Inc.*, 2007 Florida Appellant Lexis 5799 (2DCA 2007). This decision was rendered by the Second District Court of Appeals.

In this case, a Sarasota County Court ruled that the landlord had the unfettered right under lease to withhold consent to the assignment of the lease made by the tenant to an assignee and its affiliate. In that case the Appellate Court overruled the Trial Court and indicated that the implied covenant of Good Faith exists in virtually all contractual relationships inclusive of commercial leases.

The Court indicated that, notwithstanding the language in the contract, there is a “gap filling default rule” which comes into play when a question is not resolved by the terms of the contract or when one party has the power to make a discretionary decision without defined standards. *Publix Supermarkets v. Wilder Corporation of Delaware* 876 So. 2d 652, 654 (Fla. 2d DCA 2004). The second DCA went on to say that the applied covenant of Good Faith and Fair Dealing is designed to protect the contracting party's reasonable expectations. *Cox v. CSX Inter-model, Inc.*, 732 So. 2d 1092, 1097 (Fla. 1<sup>st</sup> DCA 1999). The Court further went on to indicate that “[W]here the terms of the contract afford a party substantial discretion to promote that party’s self-interest, the duty to act in good faith nevertheless limits that party’s ability to act capriciously to contravene the reasonable contractual expectations of the other party.”

### **III. Commercial Landlord or Property Manager Decision Making Process**

In situations in which a commercial landlord or property manager is faced with an assignment of lease, the commercial landlord or property manager should determine exactly what is being attempted by the assignment.

The commercial property manager or landlord can legitimately request that the new tenant provide the landlord with information in regard to (a) financial credit worthiness of the tenant (b) the intended use of the premises by the new tenant (c) what alterations the new tenant wishes to make to the subject premises and (d) whether the new tenant's business will be in compliance with all existing zoning, ordinances, city and county licensing, as well as the fact as to whether the proposed use of the premises would in any way violate any exclusive covenants existing at the subject premises and whether the intended use would fit the mix of the particular property. This is the question that should be addressed.

Simply because an office tenant decides to assign a lease to a third party tenant who might be in a position to operate a retail business from such premises and could obtain a license to validly do so, does not mean that the landlord would automatically have to consent to such use, given the fact that such use might not be reasonable under the circumstances and further would not result in a good "tenant mix" at this particular property.

The key for the commercial property manager and landlord when faced with a situation involving an assignment is to follow the Commercial Reasonableness Rule and be aware of the factors enabling the commercial landlord or property manager to exercise its rights to refuse consent to assignment of lease only under specific factual and good faith reasons to do so, utilizing the "Commercial Reasonableness Rule" and complying with covenant of Good Faith." Generally, the party who prevails in such action would recover attorney fees and other damages may also be available in this situation.

The ultimate question of the reasonableness to consent to or withhold consent to assignment is going to be a fact question for the trier of fact (judge or jury) and if a commercial landlord or property manager has any questions on this particular point it would wise for such commercial property landlord to consult with a qualified Real Estate Attorney.