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PART IV

ISSUES FOR THE COMMERCIAL LANDLORD AND COMMERCIAL TENANT IN REGARD TO COMMON AREA MAINTENANCE EXPENSES, PASS THROUGHS AND RESULTS OF COMMERCIAL LEASE AUDITS OR REVIEWS

Properly drafted common area maintenance lease provisions are important for both the commercial landlord and commercial tenant. The pitfalls for the commercial tenant by way of example, as cited in an early case dealing with commercial lease audits, was the Supreme Court Case of Macina and Follo v. Magurno 100 So. 2d 369 (Fla. 1968). In that case, the court addressed the issue of the defenses of estoppel, waiver and laches in commercial lease setting and recited the black letter law that a waiver might be inferred from conduct or acts leading one party to believe their right has been waived and further indicated where the conduct of the party is such to create an estoppel, no consideration for the waiver is necessary.

In a lease audit, the professional lease audit company that is retained will utilize a format and procedure to conduct its lease audit. The lease audit by the tenant also should remain confidential in the event that the Tenant does not want to disclose certain findings of the lease audit. In addition thereto, many leases indicate that in the event that the landlord incurs expenses as a result of the lease audit, and in the event that the lease audit does not generate any discrepancy over a certain percentage (i.e. the lease audit after all expenses are incurred does not indicate the landlord has produced billing in excess of a certain specific percentage deferential) then in such event, the commercial tenant would also be responsible for the payment of the expenses incurred by the commercial landlord for such audit.

The commercial tenant should be alert when it hires the appropriate professional representation in negotiating the initial lease as well as in the lease administration. The expenses are significant and the commercial tenant should be well aware of his or her rights and duties under the lease and extremely cognizant about identifying the overall expenses that a tenant actually will be incurring for the commercial premises. This needs

to be done to ensure that the expenses actually match up, the expenses to be incurred with the actual expenses that legally are the tenant's responsibility under the lease.

This establishes the issue for both the commercial landlord and commercial tenant that both have to be diligent in regard to identifying specific rights since annual lease payments can pass when neither the commercial landlord or commercial tenant are acting upon those lease payments which creates the potential argument for waiver or estoppel for future review. Often time both the lax commercial landlord and/or commercial tenant who do not address these issues can be faced with defenses to present enforcement of their legal rights when they ultimately realize that there have been errors or corrections which need to be undertaken.

Another example of this is the case of Western World, Inc. v. Dansby 603 So. 2d 597 (1st DCA 1992). In this case issues arose in regard to the ability of the commercial landlord to terminate the lease. A number of fact issues were raised based upon a determination due to the incorrect payment of; amount of rent, the failure to provide annual reports and payment of pass through expenses. That case not only went up on appeal, but was remanded and was again referred back to the trial court. The issues of waiver and estoppel were in place as well as the application of the contractual provisions indicating that a specific contractual waiver on one instance of default does not constitute a waiver of other instances of default. Many of the issues raised could have been corrected by an adjustment or revision to the lease prior to execution to avoid problems both for the commercial landlord and tenant as to improper payments and incorrect billings.

An example of an omission or error in common area maintenance pass through which negatively affected the landlord is the previously cited case of Miracle Center Associates v. Scandinavian Health Spa, Inc. 889 So. 2d 877 (3rd DCA 2004). This case amazingly had a tortuous time that ultimately resulted in more than ten years from the time of the initial error to the time of the review. The Appellate Court's decision was denied by the Florida Supreme Court Case Miracle Center Associates v. Scandinavian Health Spa, Inc. The brief overview of this case is a situation in which the tenant Scandinavian Health Spa leased specific space at a mall and in addition to the fixed monthly rental, was required to pay a proportion share of the annual common area expenses. The proportion share of the tenant's expenses was based upon the ratio of the gross floor area of the tenant space to the gross "leasable" floor area of the entire complex.

The Court in Miracle Center Associates also cited the Florida Supreme Court Case Thomas N. Carlton Estate v. Keller 52 So 2d 131,133 (Fla. 1951) in which it held that a "waiver may be inferred from conduct or acts putting one off his guard and leading him to believe their right has been waived."

Further the Miracle Center Associates v. Scandinavian Health Spa, Inc. cited the Supreme Court case Gilmin v. Butzloff 22 So 2d 263 (Fla. 1945) indicating that the Supreme Court made it clear that a party may waive any right to which he or she is legally entitled, including those secured by contract. As such, in the Miracle Center Associates v. Scandinavian Health Spa, Inc. case, the appellate Court confirmed and

ratified the trial court's determination in conclusion that Miracle Center Associates, commercial landlord, long term inaction qualifies as a waiver. This is a situation in which a commercial lease error actually negatively effected over ten (10) years of common area maintenance. Therefore caution and diligence are the watchwords to both the commercial landlord and commercial tenant to fully review and identify all aspects of the commercial lease as identified in this series of articles.