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COMMERCIAL LEASE NEWSLETTERS

**CURRENT ISSUES IN REGARD TO COMMERCIAL LEASES
IN TODAY'S TROUBLED REAL ESTATE MARKETPLACE**

PART I

A consistent theme that runs through my discussions with property managers is the problem that they are having with their Commercial Tenants. The problem is a result of the Commercial Tenants being unable or unwilling to continue to pay full base rent, CAM rent, and other associated charges for their commercial lease.

Many proactive Commercial Property Managers are working diligently to resolve the problem by modifying lease payments and taking steps that can assist the Commercial Tenants through this particular troubled time. Even more compelling is the fact that not only are we going through one of the worst economic downturns in the history of Florida, but as importantly we are coming into the summer months which impact and effect any retail establishments during our "offseason".

Unfortunately, and notwithstanding the good faith efforts being undertaken by Commercial Property Managers and Commercial Landlords to modify the leases to accommodate Tenants during these troubled times, many of these modifications and efforts to alter the lease terms to assist the Tenants are actually being used by Tenants as affirmative defenses to the enforcement of the lease and future litigation.

Alternatively, these efforts are also being used by Tenants as affirmative claims against the Landlord for modification of the lease or actions undertaken which increase the Tenants rights. Below are a few examples and some positive and proactive suggestions to avoid the problem (which will be discussed in both the June and July 2009 Commercial News letters) along with some updated case law reflective of some of these various points:

Verification of Lease: On many occasions the Commercial Landlords and Tenants forget that even though the Landlord has consented to some lease concessions which actually benefit the Tenant rather than the Landlord, they must have these lease concessions set forth in writing. Again, the basic concepts are:

- a. Any lease term in excess of one (1) year (and this includes any modification affecting more than one (1) year) has to be in writing signed by two (2) witnesses.
- b. Any modification of the lease, in order to avoid potential issues between the Tenant as well as interpretation of the lease for any ambiguities by the trier of fact (Court or jury), needs to be set forth in writing clearly and unambiguously and signed by the parties.

EXAMPLE: The Tenant claims that it is unable to continue to make monthly payments of the base rent, CAM rent, and other items required to be paid under the lease.

1. The Tenant indicates that if they were given an abatement of at least six (6) months, they could be able to survive and be able to repay their debt once they are able to get back to their normal, regular “season”. Further, they are hopeful during such time that the economy will begin to recover.
2. The Landlord consents to a rent abatement but indicates to the Tenant orally that the Landlord would abate rent for six (6) months for the base rent. However, the Landlord would still expect the common area maintenance rent to be paid and other cost items that are passed through to the Tenant to be paid by the Tenant.
3. The following month, the Tenant pays an arbitrary sum and the Landlord accepts same. The Tenant follows up the next month and the Landlord accepts the same arbitrary rent payment. However, now the Landlord begins to question what the Tenants understanding was as far as the terms and conditions of the abatement and wants to reconcile the amounts due.

SOLUTION:

1. The concession to the rent should have been set forth in writing in the form of a simple amendment to the lease agreement signed by both the Landlord and the Tenant.
2. The Landlord should have specified that the base rentals themselves would be abated for a specific period of time such as six (6) specific months. During such time, the common area maintenance rent and other charges would nonetheless still be billed to the Tenant and this is confirmed in writing.

3. The Landlord should have indicated what takes place after the six (6) month abatement. They should indicate whether the six (6) months of rent would be totally forgiven, or alternatively if such six (6) months of rent will be recaptured in some structured repayment schedule and future lease payments.
4. A provision be set forth in the amendment that would indicate that in the event that the Tenant hereafter defaulted any other terms and conditions of the lease (inclusive of the payment of CAM rent) that the Landlord could nonetheless claim, in addition to all damages, accruing from such breach, any abatement of rents as additional damages. The amendment should also provide for the gratification by Landlord and Tenant of all other terms and conditions of the lease which, unless specifically modified by the amendment, remain in full force and effect.

OPTIONAL:

In the event that there is an outstanding rental due at the time of the abatement, this outstanding amount should be acknowledged by the Tenant. Again, it should be addressed so that such outstanding rental or past due rental would be identified specifically so there are no misunderstanding of the parties as to the obligation of the Tenant to make payment for same. Alternatively, this is also necessary so that there is no misunderstandings of the rights of the Landlord to collect such back rent and the method in which the Landlord will be collecting it prospectively.

Failure to do so in these troubled economic times will result in ambiguities occurring and misunderstandings between Landlord and Tenant. As importantly and especially from a real estate litigation attorney's standpoint, is the fact that such oral agreements and the conduct of the parties, will (if ambiguities exist) create parole (oral) evidence to be introduced which might allow the Tenant to introduce a number of conversations, discussions as well as allow the Tenant to give its "spin" in regard to what takes place.

All of the aforementioned may result in the Landlord and Landlord's counsel spending time, effort, and money to refute the Tenants allegations and assertions that there were some modification which the Landlord believes a search was not otherwise agreed to.

As such and based upon our economic times, it is more important than ever for Commercial Landlords and Tenants to be aware of the basic fundamental concepts of structuring of leases and modifications in this Landlord/Tenant relationship, especially due to the economic conditions of our real estate marketplace and the resultant impact and effect on Landlords and Commercial Tenants.

Next Month: Additional traps for the unwary Commercial Property Manager or Commercial Landlord and an update on case law relating to commercial leases.