JANUARY

2007

KEVIN F. JURSINSKI, ESQ.

COMMERCIAL NEWSLETTER

Lease Agreement: Concise and Clear Language

In a commercial lease setting, the initial and fundamental concern of the property manager, Landlord as well as Tenant should be to have a concise and clear lease agreement identifying the rights of the parties to the commercial lease space being rented.

Given the fact that most commercial lease agreements are prepared by the Landlord it is important for the lease to contain clear and unambiguous language since there is a distinct possibility that, in the event of any ambiguity Florida Law may require that such lease agreement would be construed more strongly against the Landlord as maker of the lease rather than the Tenant.

Minimal Lease Provisions

A clear and concise lease agreement needs to address, at a minimum, the following elements:

1. A proper description of the name of the parties.
2. A specific description of the property to be leased.
3. The specific term of the lease.
4. The provision for rent payments.
5. Signatures of the parties (with two (2) witnesses if it exceeds more than one (1) year.)
6. Words of mutual agreement indicating that the intent of both parties is to create a lease contract.
7. Two Witnesses Needed

It is also important to note that any lease agreement for term in excess of one (1) year needs to be not only signed by the parties to be bound, but also witnessed by two (2) witnesses who need to sign opposite the parties name. A lease in excess of one (1) year may be declared to be unenforceable in the event that the lease does not contain two (2) witnesses.

Is a Bagel a Donut?

An example of lease drafting which contained an ambiguity which created a substantial problem for the Tenant is a case of LPI / Key West Associates, Ltd. and Southernmost Donut Co., Inc. v. Sarah Luna, Inc.749 So. 2d 564 (3 DCA 2000). In the commercial lease litigation seminars I provide to property mangers in Florida, I often refer to this case by using the question, “Is a bagel a donut?”

The reason for the problem in this particular case, is the Tenant participated in drafting an exclusivity clause so that the Tenant (who ran a small bakery and donut shop) would be the only “bagel bakery” in that particular shopping center. The intent asserted by the by the Tenant, was that this provision was to provide the Tenant with the exclusivity to be the only bakery in the shopping center. Subsequent to the Tenant entering into the lease and commencing its business, the Landlord rented space at the shopping center to

Dunkin Donuts. The Tenant objected and sought the Court to enforce the restrictive covenant in the Tenants lease agreement to prevent the Landlord from allowing Dunkin Donuts to open. The Court determined that use of the words "bagel bakery" was not clear and unambiguous and did not preclude the Landlord for leasing premises to Dunkin Donuts, notwithstanding the fact that Dunkin Donuts did in fact sell bagels. This Court determined that the term "bagel bakery" did not define the actual business being run by Dunkin Donuts and therefore Dunkin Donuts was able to open and remain in occupancy at the premises.

Accordingly, make sure the lease is clear and concise and conveys the meaning intended and more importantly that a third party reviewing the lease will understand the intent of the Landlord and Tenant in entering into the lease.

Patent and Lateral Ambiguity

There are two types of ambiguities that occur in a contract. The first type of ambiguity is called patent. Patent means that the ambiguity appears on the face of the Lease and is addressed by the lease. In such case that the Court will not attempt to rewrite the contract on matters the parties have already attempted to cover or address in the document.

The Court however can construe the intent and terms of the lease if there is a "latent" defect. A latent ambiguity is a hidden defect that concerns a matter not addressed by the parties or expressed in the contract. In a situation where there is a latent ambiguity, Florida Courts have the authority to attempt to determine what the parties would have included in a contract had they anticipated the occurrence or condition that created the latent ambiguity and in such a situation the function of the Court is to ascertain the intent of the parties and if necessary to use extrinsic or parole evidence (oral evidence), if necessary to interrupt the contract.

A Written Lease can be Modified by Oral Argument

Parole evidence or oral evidence generally is not allowed by the court to alter or modify a written agreement and would only be utilized in the event of a latent ambiguity to determine the intent of the parties. Generally, the parole evidence rule would bar varying the terms of written contract based upon other verbal promises or assurances. Notwithstanding this general promise however, (and even in the event of an "entire agreement clause" a clause generally found in most commercial leases which indicates that no other representations can be relied upon) there are circumstances in which a written lease may be changed by an oral agreement. Case law in Florida is clear that an oral modification can occur and a written lease may therefore be altered or modified if one of the parties has accepted and acts upon the other parties representations and if failure to enforce the lease in such in manner would work of fraud on either party to refuse to enforce such oral modification.

Conversation Log for Property Managers

The above is the general guideline for having an effective and viable lease agreement to be entered into between the parties. A proper review of the existing Lease instrument being used will be important so that in the event of any dispute there is no question but that the true and express intent of the Landlord and Tenant is conveyed in the written instrument. Allowing oral testimony to modify the terms of the Lease results in the Landlord and/or the Property Manager losing a great deal of control over the premises.

One of the areas that I cover in my Commercial Property Management Seminars is to suggest that all our Landlords and Property Managers keep, a "conversation log" which is simply a chronological record of all

conversations that occurred between the Landlord and the Tenant as to lease terms and conditions. In the event of any future dispute relating to what was said or done in regard to any issues relating to the lease premises or terms of the lease, there can be a specific conversation log in regard to the matter with a contemporaneous date, time and description of the conversation. On numerous occasions it has been my experience that the conversation log can raise a defense for what was said or done by the Landlord and relied upon by the Tenant and can counter assert the lease that may have been modified.

Another suggestion is to have the Landlord or Property Manager confirm in writing what was said or done. If there is in fact an agreement which modifies the lease in any way, then that modification should be reduced to writing and signed by Landlord and Tenant (Again – two witnesses here!) with such amendments being part of the lease.

Future Monthly Columns

In future columns I will be addressing specific provisions contained in lease agreements such as common area maintenance clauses, methods to enforce the lease, option to extend a casualty loss provision, operational clauses and the like. I will also address evictions and enforcement activities, inclusive of distress for rent proceedings.

In the next column of February, 2007, I will be addressing the liabilities that face Commercial Property Manager and Landlords per recent case law under Florida's Unfair and Deceptive Trade Practice Act, as well as suggestions to include in the Property Managers Commercial Lease Listing Agreement. I will also be reviewing the provisions of the Commercial Real Estate Leasing Commission Lien Act.

As I do in my seminars, I also ask the readers to please submit to me (at Kevin@kfjlaw.com) any questions you may have because I have found it educational for myself to hear different fact scenarios and questions that arise by the Commercial Property Managers that I represent and would like to address these questions in future columns.

Thanks and I look forward to next month's column.