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**COMMERCIAL LEASE NEWSLETTER**

**“SHORT LEASING”**  
**MITIGATION OF LOSS RENTALS DURING INCREASE IN**  
**VACANCIES - SUBLEASING AT A DISCOUNT (PART I)**

There are currently significant issues facing commercial property owners and managers as a result of dropping commercial property values and increasing vacancy rates. Due to our troubled economic times Commercial Tenants are faced with the choice of minimizing their business operations at one or multiple lease locations.

In minimizing the operational expenses of a specific location which may include closure, the Tenant still nonetheless needs to face the issue of ongoing obligations under its current commercial lease. When a Tenant vacates a lease space prior to the end of the lease term, the Landlord faces its own problem based upon the Tenant “going dark” and a possible failure of the vacating Tenant to make prospective lease payments for its base rent, CAM and any other additional charges that are due by the Tenant under the commercial lease.

One positive way to address the problems facing both the Landlord and the Tenant is to engage in “Short Leasing”.

**“Short Leasing”**: This is an approach to minimize and mitigate damages by a commercial Tenant. “Short Leasing” is a procedure of subleasing, assigning or subsidizing a sublease or assignment for a placement Tenant (“New Tenant”) at the vacated premises. I have termed this approach “Short Leasing” since it is analogous to a short sale in which the defaulting borrower ends up selling their property for lower than the amount of the mortgage with the borrower negotiating a work out on the short fall with the lender. By utilizing “Short Leasing” the same concepts is applied, but in this case the Tenant takes proactive and positive steps to sublease or assign its Lease and subsidize or negotiate a workout with the lender for the balance of the lease terms similar to a format in a “short sale” arrangement.

Here is how a “Short Leasing” approach would work.

1. **Remedies of Landlord in the event of default of the Commercial Lease:** In a lease default situation, a Landlord can initiate suit against the Tenant to not only recapture the outstanding rentals, but the Landlord can pursue a claim for other damages accruing to the Landlord which may include accelerated rentals due under the lease, attorney fees, costs as well as the expenses of re-letting the premises. There is a way to address the problems facing both the commercial Landlord and the commercial Tenant and that is for both parties to initiate an assertive effort to be proactive and to mitigate and minimize damages.
2. **Efforts of the Tenant to Minimize Lease Damages:** The Tenant, notwithstanding the fact that the Tenant is vacating the premises, has a unique opportunity to aggressively advertise the premises for lease. The Tenant can undertake re-letting the premises by way of a lease assignment or subletting on its own. Unless a Tenant has commercial lease specialist on staff, a better approach may be to hire a commercial leasing agent who specializes in the area of commercial leasing. This broker can maximize the opportunity for a prospective Tenant (“New Tenant”) at the vacated location by offering tenant subsidized incentives given by Tenant to new a New Tenant on the assignment or sublease.
3. **Potential Lease Damages in Lease Default Situation:** By way of example, in the event a Tenant is currently paying \$15.00 per square foot for a 5,000 square foot location and also has the obligation to pay the total of \$7.50 in CAM and marketing budget, the Tenant faces a monthly expenditure of \$22.50 per square foot for a total of \$9,375.00 per month to the Landlord. Assuming there is three (3) years remaining on the lease and the Tenant for economic reasons needs to close this location. In such a case the Tenant would face current monthly rentals of \$9,375.00 together with prospective rentals. The Landlord could initiate suit against the Tenant for not only the current rentals, but accelerated rentals together with attorney fees, costs and any lease up fees that may occur. These damages would only be offset by any actual monies received by the Landlord with the accelerated rentals being reduced to present value but grossed up by any incentives that the Landlord has to offer to a prospective Tenant to take the premises.

Using our example and assuming there are three (3) years left on the lease and the current Federal Discount Rate is 1%, the Tenant would face accelerated rentals at \$9,375.00 per month for thirty five (35) months (\$328,125.00) reduced to present value in the amount of \$324,843.75. (This is a simple calculation that assumes an immediate award by the Court accelerating at one (1) month after the default. In normal circumstances the judgment won't be entered for six (6) to twelve (12) months, at the earliest.) Nonetheless, based upon the above and foregoing, there is going to be an exposure to the commercial Tenant of a substantial, significant judgment in excess of **\$334,218.75**. Plaintiff is entitled to recover past due rents and accelerate future rents accruing after Final Judgment together with recovering reasonable attorney fees and costs.

NEXT MONTH: STEPS TO BE ADDRESSED IN A “SHORT LEASING” APPROACH.