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COMMERCIAL LEASE NEWSLETTERS

Commercial Lease Renewals/Options to Renew

Often times our Commercial Property Management/Commercial Landlords are confronted with issues relating to lease renewals, Options to Renew and occasionally Options to Purchase contained in the lease instrument (the latter to be covered in the September Newsletter). The question always arises, "Is this an affective lease renewal?"

In order to answer this question you must first look at some of the fundamental concepts underlined in the document.

I. Lease Agreement - Clear and Unambiguous Language Pertains To Options to Renew and Purchase.

In the first Commercial Lease Newsletter that I prepared (January 2007), I identified the fact that the lease instrument should be properly drafted and be clear and unambiguous as to its terms and conditions. Even more compelling is when the lease instrument addresses issues such as Options to Renew, Options to Purchase and other issues which can have a significant impact upon the Landlord's bottom line.

In addition to being clear and unambiguous as far as its language, the lease option should also avoid being an "Agreement to Agree." It is quite common to see lease options or annual renewals provisions drafted as follows:

"At the end of the initial lease term, the Tenant shall have the right to extend this lease, and at such time Landlord and Tenant shall agree upon an applicable fair market rent for the subject premises."

Depending upon whether you represent a Landlord or a Tenant, the argument could be made that there is no enforceable Option to Renew based upon the fact that this is simply an "Agreement to Agree." Agreements to Agree are not enforceable contracts in the State of Florida.

One person's interpretation of "fair market rent" can clearly be different than another's and, accordingly, the argument can be made (depending if you are advocating a Landlord's or a Tenant's position) that no effective option exists or obligation thereof as a result of the fact that there are no definite terms and conditions other than the nebulous "fair market for rent."

II. Time for Exercise of Renewal Option.

Often times, there is also a problem when the language is not clear as to when the Tenant can exercise his Option to Renew and again this leaves a great deal of uncertainty to both the Landlord and Tenant and (depending upon the circumstance and the marketplace) potential litigation in the event either party wants to avoid the Renewal Option. The language should clearly identify the date and time prior to the expiration of the lease term that the Tenant can exercise the Option to Renew. There should also be a specific provision contained in the lease that indicates just how such Option to Renew is going to be made and delivered. Generally, the most effective way for the option to be renewed is to be in writing and delivered either via hand delivery or Federal Express/courier to the Landlord by the Tenant in order for there to be an effective lease renewal. Again, the time period should be an adequate time prior to the expiration of the lease term to enable the Landlord to plan for a substitute Tenant, but not such a time period that requires the Tenant to make an election far in advance of the termination date of the lease.

Generally on a five year lease for retail space, a hundred and twenty to a hundred and eighty (120-180) days out for renewal is considered reasonable, since it takes a significant period of time to obtain a substitute retail Tenant, together with the fact that space planning and permitting may also increase the time period for a replacement Tenant to occupy the premises.

III. Automatic Renewals or Leases in Perpetuity.

There are certain leases which identify the fact that the lease will automatically renew either on the same terms and conditions or on the same terms and conditions less and except for an annual increase in the rental based upon CPI or some other indicator.

Florida Courts, like other states, are consistent in that the absence of clear intent by the parties to create a lease in perpetuity a covenant to renew is satisfied by only one (1) lease renewal.

Accordingly, unless a series of options are identified with specificity and unambiguous terminology, the courts will, at the very most, allow for one renewal notwithstanding the language of continuing renewals of the lease unless an objection is made. Chessmasters, Inc. v. Chamoun, 948 So. 2d 985 (4DCA 2007); PL Lake Worth Corp. v. 99Cent Stuff-Palm Springs, LLC., 949 So. 2d 1199 (4DCA 2007).

IV. Actions of the Landlord Inconsistent with Exercise of the Option.

The Courts have construed that these options and renewal terms can not be blocked nor can one party take advantage of another party which results in the other party claiming a non-renewal.

In the case of Chessmasters the Court was clear that each party must cooperate in good faith in regard to the action. In this particular case, the Landlord failed to timely respond to a request to provide documentation relating to certain lease expenses and did not timely comply and or refused to supply the information. Based upon the inability to have the information, there was a problem with the exercise of the option and in this particular case the Landlord negated the Tenant's option to obtain the lease renewal because it had not timely made such election.

The Tenant, as identified by the Court, properly had the right to exercise the option because it was denied access to the information which would form the basis of the Tenant's decision to exercise such option. The Court felt that the Landlord had not exercised his duty of good faith in regard to the lease agreement and by failing and refusing to supply the information precluded the Tenant from making an intelligent decision on the renewal and therefore allowed the Tenant additional time within which to make the renewal.

Next month we will address Options to Purchase and First Rights of Refusal as contained in Lease agreement.