

FEBRUARY

2008

KEVIN F. JURSI NSKI, ESQ.
COMMERCIAL LEASE NEWSLETTERS

“Going Dark” and Co-Tenancy Clauses
(1st of 2 Parts)

In the February 2008 and March 2008 Newsletters I will be addressing two separate provisions which need to be read together and understood by Commercial Property Managers and Landlords: “Going Dark” and Co-Tenancy Clauses.

Part I. “Going Dark.”

As used in the vernacular of commercial leases, “going dark” means that a Tenant ceases business operations at the leased premises. The reason why a Tenant would cease operations at the business premises are for a variety of reasons, but the result upon the Landlord is that the Landlord has, at the very least, a situation in which the leased premises appear to be abandoned which may or may not have an economic impact upon the Landlord depending upon the continuous payment of rentals (discussion below) but certainly from the standpoint of a retail and commercial center, a Tenant “going dark” has a negative impact and effect upon the Landlord especially when the anticipated time period for such succession of operations is for an extended period of time.

Further, if Tenant “goes dark” this may have a negative impact not only on the viability of the center from a perception standpoint from prospective customers, but also a negative impact on the center as to percentage rentals, customer foot traffic and other intangibles.

Clearly from the standpoint of an anchor Tenant, “going dark” could have a dramatic and extremely detrimental impact upon the retail center as to the local Tenants then remaining. For example, this could be a major supermarket chain “going dark” which supermarket was the anchor Tenant for that center and drove a substantial amount of the prospective traffic to the center. There is even a more severe impact upon the center since as indicated above there are several critical factors for the commercial Landlord/commercial Tenant to keep in mind in the operation of the center:

1. **Collecting as much rent as the market will bear in a timely and full manner.**

Closure or "going dark" of some Tenants or possibly "going dark" of an anchor Tenant may have a negative impact upon the timely payment of rents and/or a "domino" effect upon other Tenants seeking to vacate.

2. **Keeping the center healthy and keeping the center viable and the remaining commercial Tenants successful in their own operations.**

The obvious impact of an anchor Tenant "going dark" (or other critical Tenants) would have a drop in traffic and a subsequent fall off in the successful operation of other Tenants which again could negate in poor compromise of Goal Number One: Timely payment of rent.

3. **Obtaining as much financing as possible and keeping its lenders satisfied.**

Depending upon the debt coverage ratio required by the loan agreements, Tenants "going dark" may impact the vacancy rate or alternatively may impact upon prospective rents to be received.

4. **Tenant mix, customer draw, profitability, or ability to re-let the premises.**

The Tenant mix, customer draw, profitability, or ability to re-let the premises may also be negatively affected or impacted by the closure or the "going dark" of a Tenant.

Closure of a Tenant may also have an impact upon co-tenancy clauses existing in other Tenants' leases thereby again having a continuing "domino" effect of a drop in rents or issues with other leases (co-tenancy clauses briefly defined and more fully identified and discussed in March's newsletter) is the fact that certain leases contain provisions that allow such Tenant to either reduce its rent or in certain instances cease paying rent entirely in the event anchor Tenants or a certain percentage of occupancy of the entire retail center is not in operation.

5. **Express continuous operations clause.**

To address the issue of "going dark" a Landlord should contain a provision in its lease for an express, continuous operations clause. A continuous operations clause should require the Tenant to remain in continuous operations and also be in compliance with the continuous hours of operations. The language must be precise and clear to identify specifically that the Tenant not only has to continuously operate their premises but cannot vary or alter the days of operations or cannot vary or alter the hours of operations since those variances can also have a negative impact upon the center with corresponding negative results.

Further in addition thereto, the Landlord should consider the express continuous operations clause as opposed to simply relying upon implied continuous operations provisions. The remedies for a Landlord would be to claim a breach of lease, claim specific enforcement or injunctive relief by the Court or seek performance/injunctive relief through enforcement by the Court.

The problem with these two remedies is that the remedy for breach of lease for non-payment doesn't really accomplish the goal which is a deterrence of the "going dark" provision. The Landlord actually suffers additional damages as a result of the "going dark" in addition to the loss of income.

There is also a situation in which a Tenant, such as a national anchor, may consider “going dark” but continues to pay rent. Unless there is a specific provision against this many Courts will indicate that the Landlord has not suffered any monetary damage from loss of rent and the Landlord would then have to specifically prove those tangible damages for the Tenant “going dark.” Further, if the Landlord simply seeks to obtain injunctive relief the Court may indicate that it is really not in the position to force or compel a Tenant to remain open since that is a continuing administrative obligation of the Court and there are cases to indicate that injunctive relief under such circumstances may not be not appropriate or a recommended course of action for a Court to take since it would require specific performance/administration of the lease by the Court. See Mayor’s Jewelers, Inc. d/b/a Mayor’s Jewelers v. State of California Public Employees’ Retirement System, 685 So. 2d 904 (4 DCA 1996).

Under these circumstances, it is quite obvious that the Landlord needs to take a proactive position in their express continuous operations clause and include therein a specifically and well drafted liquidated damage clause identifying the mutual, clear and concise language. This is defined given the fact that not only would the Tenant be in breach of the lease agreement based upon the failure to continuously operate its business but the Landlord could recover, in addition to the monetary damages as a result of the Tenant’s non-payment of rent (if in fact such be the case), specific liquidated damages since the Tenant’s “going dark” would have a negative impact on the Landlord but which might not be readily ascertainable at the time the lease was entered into. These damages would include: loss of prospective Tenants, negative impact upon other Tenants, loss of percentage rent from the existing Tenant that “went dark,” and potential loss of percentage rent from other Tenants as a result of the defaulting Tenant “going dark.”

The Landlord should be cautious and retain appropriate legal counsel to properly draft the liquidated damage clause since the enforceability of the liquidated damage clause needs to be determined by the Court. Many Courts continue to be very “Tenant friendly” and they may construe that a liquidated damage clause under certain circumstances could be considered a penalty. See Kevin F. Jursinski, Esq. Commercial Lease Newsletter dated January, 2008, “Exclusivity Clauses and Use Clauses.”

As such, the Landlord is advised to take all appropriate cautions relating to the potentialities of a Tenant “going dark.”

Next Month: Part II: A discussion regarding co-tenancy clauses and their equally potential negative impact upon the Landlord, operation of its center, profitability as well as financing.