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**COMMERCIAL LEASE NEWSLETTERS**

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

**PART II**

This is continuation of our series in regard to problems facing Commercial Property Managers, Landlords and Commercial Tenants in today's troubled economic times. This Newsletter addresses the issue regarding payment of rents and lease guarantees.

I review a wide variety of leases being provided to me in Southwest Florida affecting commercial lease premises. Many of the leases contain attempts by the Landlord to have a Tenant guaranty the lease performance so that the Landlord does not need to look solely to the Tenant's Company for payment of the lease obligations. If the Tenant's company is failing in business and needs to vacate the premises, then in such event, it is a sound business decision for the payment of rents to the Commercial Landlord to have the opportunity to pursue a claim against the principals of the company or the individuals that have a financial relationship with the company. The principals ideally would be able to pay the outstanding sums due and owing under the lease agreement.

Here are some issues to consider:

1. Pre-Lease Credit Check: The Landlord should do a background and credit check on the Tenants as well as the principals and guarantors. Generally, most Florida LLC's and Corporations should not be considered as having sufficient assets to protect the interest of the Commercial Landlord for lease payments, unless an entity has a substantial and significant track record that the Commercial Landlord can rely upon. However, in today's troubled economic times even major corporations may turn out to not be collectable in the future (See AIG, Chrysler, Lehmann Brothers, etc.). The Landlord should look to the principals of the company or other financial backers of the company for additional security in the form of a guaranty.

2. Financial Statements: The Landlord could determine the credit of the guarantors and principals by obtaining financial statements from them, which would be no different than if the Landlord was going to be issuing a loan to these individuals (which in effect the landlord is doing by conveying an interest in the Landlord's commercial property for a period of time (i.e. the Lease) in consideration for the repayment by the tenant or the principals for such obligation).
3. Assets: Further, by obtaining a financials statement from the prospective principal or guarantor, the Landlord will arguably have a starting point as to assets to seek recovery in the event of a potential default or need to obtain judgment and collection thereof.

Guaranty: As indicated I see a wide variety of lease guaranties. The following are some basic concepts for the guaranty:

1. Separate Instrument: Many times I see leases which are "guaranteed" by simply having a signature block with the persons name identified as "guarantor." I question the practice and suggest it not be followed. There is always the issue of the intent of the guaranty and the enforceability of the guaranty, all of which should made clear by the landlord taking proactive steps in properly drafting the guaranty.
2. The Payment and Guaranty of Collection: The several difference types of Guarantees are:
  - a. Individual Guaranty of Lease: This guaranty is for payment and obligations of the Tenant on the lease. This is the guaranty to use.
  - b. Guaranty of Collection: The second guaranty is sometimes referred to as a Guaranty of Collection. This requires the Landlord to initiate suit against the Tenant and take all steps necessary to recover the debt obligation. Only after such efforts are undertaken and exhausted will be the Landlord be in a position to attempt to recover the deficiency against the guarantor on the guaranty of payment on it. I prefer the latter.
3. Lease Guaranty to Provide for Attorney Fees: A lease guaranty should also provide for the recovery of attorney fees. Failure to have that provision contained in the lease identifying the recovery of attorney fees can result in the landlord failing to obtain attorney fees and costs if the Landlord is successful in pursuing a judgment in the guaranty.
4. Signature: The signature of the guaranty needs to be very clear indicating that it is a personal obligation of the person signing and that no guaranty should allow the person signing it to indicate a capacity level other than individually.

In the June Newsletter we indicated that there would be some reference recent case law in Florida. One recent case is Fairway Mortgage Solutions, Inc. and Fernando Recalde v. Locust Gardens 988 So. 2d (4<sup>th</sup> DCA) 2008. In that particular case there was a concern over the lease guaranty. In that particular case the Landlord in the lease indicated as follows:

***“The Tenant Signature above also indicates acceptance of Personally Guaranteeing this Lease and is being freely given as per section “G” of this lease.”***

In the Fairway case there was no separate written guaranty. The guaranty was simply a signature block on the lease with the aforementioned language. Further, the guaranty was then signed by the Grantor in the capacity as “president”. Quite obviously this creates an issue as to the interpretation of the lease.

5. Intent of Guaranty/Question of Law: Lease guaranties and the interpretation thereof is a question of Florida Law. Further, this case indicated that addresses the concept of “Descriptio Personae” which is:

***“...a signature preceded by the word “by” and accompanied by descriptio personae, that is language identifying the person signing the document as a corporate officer or something similar, does not create personal liability for the person signing a contract to which he or she is not a specified party, unless the contract contains language indicating personal liability or the assumption of personal obligations.***

Based upon the above and foregoing, the landlord is well advised to prepare a lease guaranty separate and apart from the actual lease and have the guaranty properly drafted to avoid enforcement problems as indicated above.

I would recommend that the Landlord obtain a lease guaranty prepared by an attorney who is well versed in such issued.

Next month, Part III, tenants actually holding over after the end of the lease and refusing to pay rentals.