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COMMERCIAL LEASE NEWSLETTERS

I. Landlord and Tenant obligation for premises build-out, maintenance and repair.

Unlike a residential setting in which there are statutory provisions identifying specific obligations of the Landlord and Tenant as to maintenance and repair, (see Florida Statute 83.51 and 83.52) in a commercial lease setting, the obligations as between Landlord and Tenant for premises build-out, maintenance and repair are a matter of contractual obligations to be entered into between the parties.

Care needs to be given for each and every one of these specific areas of obligations, both as to the Landlord and Tenant.

II. Premises Build-Out.

In most situations, at the commencement of a commercial lease, there is a provision for a Tenant to perform maintenance, repair or build-out in one of the following categories:

1. Landlord provides a certain square footage dollars for reimbursement to the Tenant to allow the Tenant to effectuate repairs.
2. The Landlord contracts to do a certain specific amount of work at the premises with the Tenant doing the completion of the build-out.
3. The Landlord negotiates a lease in which the premises are surrendered to the Tenant in "as-is condition" or if new premises, a "vanilla box".

III. Landlord performs percentage of Tenant build-out

It is important under these situations for both the protection of the Landlord as well as the Tenant that specific areas of build-out that fall within the category of the Landlord's obligation be specifically identified. It also should be identified in the lease that the "Landlord's Work" should only encompass a set amount of work and such "Landlord's Work" should not carry over into the critical path management (construction schedule) of the Tenant's obligation to build-out its premises.

The Landlord should be cautious in identifying specific work to be performed, the nature and scope of such work as well as the time period that such work should be done. As often is the case in situations when there is premises build-out, the Tenant is provided with a commencement date of the lease as well as an occupancy date.

The Tenant has certain particular requirements for building out the premises to suit its individual needs. The Landlord needs to be cautious that the scope of the "Landlord's Work" should not overlap into any areas which would allow the Tenant to claim that the Landlord has delayed its performance, thereby allowing the Tenant to claim a default in the lease. Alternatively, in situations where the Landlord is to do a certain aspect of the build-out, a Tenant may claim that for some reason the Landlord has improperly or untimely performed its obligations, resulting in Tenant being unable to perform its obligations, and accordingly, the Tenant would then have a defense for abatement of rent based upon the Landlord's failure to perform.

The best advice to a Landlord is to: a.) Be specific in identifying "Landlord's Work"; b.) Strictly monitor Landlord's performance and percentage of Tenant build-out and document same.

IV. Per Square Footage Contribution.

The simplest way for a Landlord to contribute to Tenant build-out is for the Landlord to provide the Tenant with a square footage allocation contribution, giving the Tenant reimbursement for a certain amount of money per square foot as a credit towards the build-out.

This amount of money should be paid to the Tenant once the work is completed or, at the very earliest, as each stage of the work is completed. The Landlord does not want to be in a position where it reimburses the Tenant in advance for construction work at the premises which has not yet been completed or when payments are still outstanding to contractors, subcontractors or material suppliers [see discussion in section VI below]

V. “As-Is” Condition.

The Landlord can surrender the premises to the Tenant in a “as-is” condition, but it should be noted that the Landlord should take all necessary steps to ensure that the premises are fully inspected and, at the very least, no existing code violations occur at the premises.

The reason for this is the recent Supreme Court case of P&R Inc. v. Beacon Property Management, 842 So. 2d 773 (Fla. 2003), in which the Tenant was able to establish an independent tort action against the Landlord (as well as the property manager) for failure to notify the Tenant of an existing code violation in the interior wall structure.

VI. Florida Statute 713.10 - Disclaimer Protection as to Construction Lien

When a Tenant is doing build-out of the Lease premises, there may be a problem as to the payment to the contractor, subcontractor or material supplier. The problem arises when a contractor, laborer or material supplier attempts to assert a construction lien against the Landlord’s interest in the premises as a result of work being performed by the Tenant in accordance with the contract. The Landlord should be advised to comply with Florida Statute 713.10, which requires the memorandum of the lease agreement to be recorded in the public records indicating a restriction on liens being implemented as against the interest of the Landlord to the subject premises. Florida Statute 713.10 states in pertinent part as follows:

“(1) The lease or a short form thereof is recorded in the clerk’s office and the terms of the lease expressly prohibit such liability; or

“When an improvement is made by a lessee in accordance with an agreement between such lessee and her or his lessor, the lien shall extend also to the interest of such lessor.”

(2) All of the lease entered into by a lessor for the rental of premises on a parcel of land prohibit such liability and a notice which sets forth the following is recorded by the lessor in the public records of the county in which the parcel of land is located...”

In either event, however, the Landlord needs to protect itself on these particular situations. The case of A. N. Drew, Inc. v. Frenchy’s World Famous Cajun Café, Inc., et al., 517 So. 2d 766, 1988 Fla. App., worthy of review as to a contractor's claim of lien for Tenant improvements when the improvements constituted the "PITH" of the Lease. Care should be given in this area to seek the advice of an attorney.

Next Month: Landlord and Tenant’s repair obligation – Who is responsible in a commercial lease?

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