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## **Real Property Commercial Leases: Provisions and Issues**

This writer recently reviewed and negotiated a 64-page commercial lease of a retail space. That's right - 64 pages. It touched a myriad of substantive law topics either expressly or by implication, including land use, creditor's rights, bankruptcy, insurance, the UCC, and construction law. A commercial lease matter is no small undertaking.

This article is not a primer on real estate clauses. We have other sources for that, a favorite being Oklahoma Real Estate Forms, Alan C. Durbin and C. Temple Bixler (Matthew Bender). Rather, the scope of this work is to identify and discuss recent commercial lease issues that arose in this writer's practice.

### **Getting started**

Assume your client is an entrepreneur, trying her hand at the restaurant business.

Typically, the entrepreneur will create a new entity to act as the Tenant. If multiple entrepreneurs are involved, then multiple entities should be established, with a proper operating agreement drafted to govern the parties' conduct. This tactic, often overlooked, protects the entrepreneurs against personal liability in the event of a dispute among themselves. The Tenant will register the trade name if any, establish an EIN, and open bank accounts.

The Landlord will require a personal guarantee, with joint a several liability if multiple parties are involved. The Landlord may also seek a third-party guarantor, and request rent payable via electronic funds transfer.

Attorneys should counsel the entrepreneur to draft a business plan and pro forma income statements for 12, 24 and 36 months. A frequently cited cause for business failure is lack of operating funds, so advise your client to maintain a war chest, holding adequate funds until the venture gets on its feet.

### **Tenant's Improvement Allowance for first-generation, retail space**

Frequently, a Landlord will contribute to Tenant's cost for readying the space, especially if the premises are first-generation (never occupied before). What's the catch? The Tenant will need to strictly comply with the Landlord's requirements. Before the Landlord will deliver the Tenant's improvements allowance, these obligations must be met:

- Tenant hires Contractor and/or Architect (must be a bona fide third party not affiliated with the Tenant)
- Tenant requires performance and/or payment bonds from Contractor
- Tenant requires lien waivers from Contractor and/or Subcontractors
- Landlord must pre-approve Tenant's plans
- Landlord must review Tenant/Contractor agreement
- Tenant provides proof of "all risks" builders risk insurance in the amount of improvements before work begins
- Tenant must deliver permanent certificate of occupancy
- Landlord must be satisfied that all construction costs have been paid (lien waivers)

- Tenant must commence business
- Landlord must receive all warranties in assignable form
- Landlord delivers Tenant's Improvement Allowance

### **Tenant Relocation**

Landlords frequently have the right to relocate the Tenant, at Landlord's expense, to comparable space. If opposed to the relocation, Tenant may object, arguing that the space is not comparable.

If Tenant is forced to relocate, ask the Landlord to make the Tenant whole, including all direct and indirect expenses of the relocation. Tenant should provide Landlord an approved list of vendors. Landlord in turn pays the invoices. Reimbursable expenses include:

- Time spent by Tenant's staff
- Web page changes
- Phones
- Internet
- Movers
- Tenant's legal expenses

Other provisions that the Tenant may require:

- Relocation to occur over the weekend or after hours
- Landlord fully indemnifies Tenant for all issues that arise

- Amend lease so that Landlord may not force another relocation
- Landlord improves the lobby and/or restrooms near the new space

### **Tenant Payments**

Some commercial Tenants simply do not pay on time. This clause should put a stop to this nonsense:

If Tenant fails two (2) times in any twelve (12) month period to make Rent payments within five (5) days after such Rent payments are due, Landlord, in order to reduce its administrative costs, may require, by giving written notice to Tenant that Rent is to be paid quarterly in advance instead of monthly and that all future Rent payments are to be made on or before the due date by cash, cashier's check, or money order and that the delivery of Tenant's personal or corporate check will no longer constitute a payment of Rent as provided in this Lease. Any acceptance of a monthly Rent payment or of a personal or corporate check thereafter by Landlord shall not be construed as a subsequent waiver of said rights. \_\_\_\_ **Tenant Initials**

### **Billboard Leases**

Billboard leases are big business. Material terms:

- What is the minimum?
- Digital or static? Both sides?
- Is royalty a percentage of grossly monthly receivables?

- When must the construction begin?
- Who holds the ODOT permit?
- What is the primary term? Any options to extend?
- Does Lessor have the right to approve assignment of lease?
- What if the lessor's property is condemned?
- Are there any variances required of the city?

### **Case study**

Landlord buys 20-acre tract, subdivides it equally, constructs a building on one parcel, leases newly constructed building with a purchase option, and Tenant performs a portion of the construction on the building.

Issue spotting:

- Assuming construction delays, how do we determine the commencement date?
- Does Landlord require a boundary survey?
- Does Landlord require an easement?
- Assuming Tenant falls behind on electricity payment. Can utility hold Landlord responsible for overdue payment?
- Tenant ultimately signs purchase agreement, which is a different sum than that stated in Lease Purchase Agreement. Problem?
- Landlord may consider financing the purchase, i.e. Landlord becomes hard-money lender. What are the advantages?

- Tenant ultimately elects to not buy the building, but elects to renew the lease.

New purchaser requires tenant estoppel certificates. What?

