

Attorney Jessica T. Zolotorofe discusses seven lease provisions important to commercial landlords in *Mid Atlantic Real Estate Journal*

The following is a guide for landlords to follow when beginning negotiations with a tenant.

By Jessica T. Zolotorofe, Esq.



While letters of intent are not binding in many states, oftentimes national tenants will not allow renegotiation of any memorialized terms once the Letter of Intent (LOI) is signed. Thus, it is always advisable for landlords to have an attorney review before it is executed. That being said, the following is a guide for landlords to follow when beginning negotiations with a tenant.

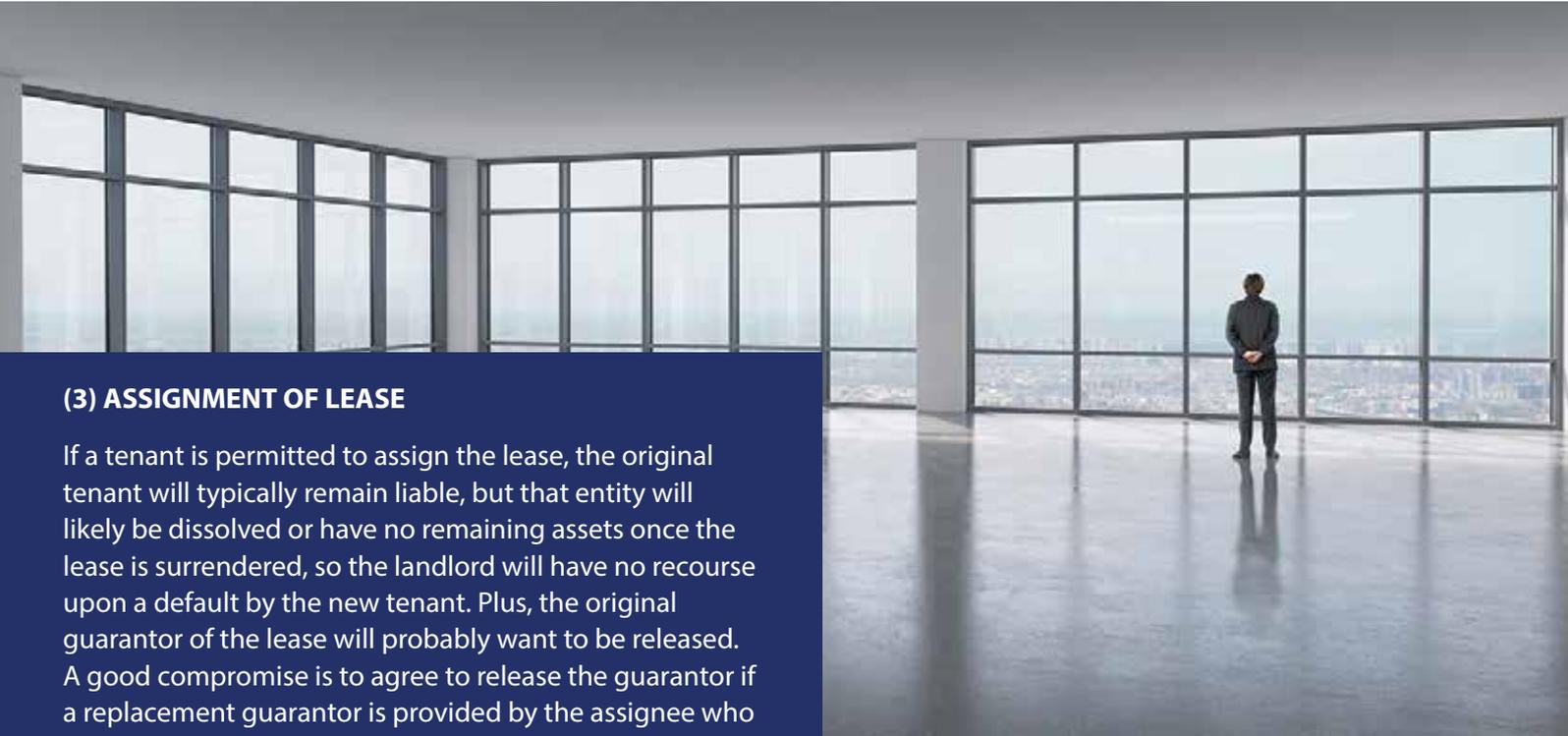
(1) CAM CAPS

Tenants will often require a cap on the annual increase of their common area expenses. Landlords should ensure that only “controllable” expenses are capped, which should exclude snow, ice, insurance, and tax increases.

Additionally, it is not unusual for a tenant which has many locations to only review common area maintenance charges when either the tenant is ready to renew the lease, when estoppels are requested, or periodically over numerous years. Leases should provide that the landlord must be notified of any dispute in the accounting of common area expenses within twelve months after receipt of landlord’s reconciliation report. This will protect a landlord from having to potentially reimburse a tenant a large sum after many years of an inadvertent miscalculation in its maintenance charges.

(2) LANDLORD’S WORK

If the lease contains a requirement for a landlord to complete certain work prior to delivering possession to the tenant, it is important for the lease to provide that the condition to delivery is only that landlord’s work be “substantially complete”, which should be defined to exclude minor punch-list items, construction on other parts of the shopping center which are not immediately adjacent, and weather dependent items such as landscaping, provided same do not materially interfere with Tenant’s ability to perform tenant’s work or to open for business.



(3) ASSIGNMENT OF LEASE

If a tenant is permitted to assign the lease, the original tenant will typically remain liable, but that entity will likely be dissolved or have no remaining assets once the lease is surrendered, so the landlord will have no recourse upon a default by the new tenant. Plus, the original guarantor of the lease will probably want to be released. A good compromise is to agree to release the guarantor if a replacement guarantor is provided by the assignee who

has equal or greater net worth to the current guarantor. This provides the landlord with the same bargain for which they initially benefitted.

Additionally, as a condition to assignment of the lease, the tenant should have to pay all of landlord's costs incurred in connection therewith, including legal fees to review the assignment, and other expenses, for example, an architect's review of the assignee's plans for renovation of the premises.

(4) TERMINATION RIGHTS

Also known as the "kick-out provision", many national tenants require a right to terminate their leases if their sales do not meet a certain threshold after a specified period of time. Tenant lease forms often provide that the tenant can terminate at any time after a certain time period, for example, the sixtieth month. It is very difficult to sell or finance a property with a lease that can end at any time, even if there are seemingly many years left in the term. Thus, a landlord should require its tenants to exercise their termination right within a short window. To continue the above example, notice would have to be provided between the sixtieth and sixty-sixth months of the lease term.

In the event that a tenant is going to have the right to terminate pursuant to the lease, a landlord should attempt to negotiate a termination fee, in addition to reimbursement of the then unamortized portion of:

- the broker's commission paid by Landlord in connection with the lease, and
- any allowance paid by the landlord to the tenant for build-out costs.

5) MONETARY DEFAULTS

Tenants will often make the argument that monthly rent payments can get lost in the mail, or there can be a clerical error that causes a payment to be late, and thus they require written notice from landlord before any penalty can be imposed. However, landlords should argue that it should not be their responsibility, especially a landlord that manages many tenants, to notify each tenant that they are late in complying with their monthly, recurring obligations under the lease. A good compromise is offering a tenant written notice for the first monetary default, and thereafter, late fees can immediately be assessed and non-payment will constitute a default without further notice.

6) CONFIDENTIALITY

Often overlooked, a critical term of any lease agreement, especially those for multi-tenant centers, is the confidentiality provision. Other than tenants' agents, lawyers, accountants, and lenders, tenants should not be permitted to disclose any of the terms of their lease agreement. Particularly their rental rate and any concessions, such as free rent or allowances, should be kept confidential as to not cause other tenants within the center to attempt to renegotiate their leases, which could cause a significant problem for a landlord.

7) "GO DARK" AND RECAPTURE

Sometimes tenants will request a "go dark" provision, which will allow them to cease operation at the premises so long as they continue to abide by their other obligations under the lease. This way, if a tenant's business is not succeeding at the location, and it is not financially favorable to continue to pay the costs of conducting business, a tenant has the option of avoiding a default under the lease, while still closing its operation

at the premises. Especially in a multi-tenant center, this can be detrimental to a landlord who relies on the tenant's foot traffic, or who does not want a dark unit for years, which may render the center undesirable to other potential tenants.

In the alternative, it is a better scenario than the tenant defaulting and not paying the rent at all. A landlord should weigh the advantages of continuing to receive consistent rent with having a dark space in the center.

These may not all be deal breakers, but they are a few provisions to keep an eye out for when opening negotiations.

Leases are complex and each lease has unique terms and provisions, so Landlords should always get a lawyer involved early on in the process to ensure that their interests are fully protected.

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