



Opportunities for Landlord Abound When Tenant Exercises Renewal Option

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By Ira Fierstein

When a tenant exercises an option to renew its lease, the landlord's usual inclination is to save time and effort by treating the tenant's notice letter as sufficient to accomplish the renewal. This inclination should be strongly resisted — not only because such a notice may be inadequate, but also because the landlord may be missing out on an opportunity to update the original lease and often improve upon the existing documentation. This is especially true where the renewal is at "market," which offers the landlord the possibility to argue that certain changes are necessary to conform to market conditions.

A common problem is that the parties to the original lease have changed, and the changes have not been adequately addressed in the past. Therefore, the first item the amendment should address is the route the lease has taken to end up with the parties who are signing the amendment. Often, there have been assignments, mergers, or name changes, and the parties to the original lease are not the parties who need to sign the renewal documents. The amendment should trace the chain of transfers and explain how the parties ended up being who they are. This presents an opportunity for the landlord to require formal documentation from the tenant to justify internal transfers and to verify that the party now in possession has the financing wherewithal to support the lease. Often, the landlord will conclude that the current party in possession needs to come up with an additional security deposit or a guaranty to the lease. The landlord should have any existing guarantor reaffirm that the guaranty remains in full force and effect through the extension period and that the guarantor consents to and acknowledges all of the terms and conditions of the amendment.

In addition to establishing the length of the term and the rental amounts, which may have been established in the original lease, the landlord should carefully review the original lease and require that the tenant confirm or acknowledge that certain events have already occurred or are no longer necessary. Have the landlord's construction obligations been satisfied? Has any allowance been paid? Have all of the tenant's due diligence contingencies been met? If so, the amendment should acknowledge that these provisions have been satisfied and are no longer part of the lease.

If the tenant is exercising a renewal set forth in the lease, the amendment should acknowledge this fact and confirm that the tenant has no further renewal options as a matter of right (or specify the number of remaining option(s) the tenant has left).

Has the tenant mix or occupancy level of the shopping center changed so that certain covenants in the original lease are no longer economically feasible? For example, unless the tenant has the right to insist upon it, the landlord can use the renewal negotiation to end or limit an exclusive use of the tenant, lessen co-tenancy requirements, soften CAM exclusions or "caps" that may no longer satisfy market conditions, or expand rights of the landlord to use common areas of the center for further development or sales areas, where the original lease may have contained a restriction in doing so.

The landlord should also confirm its limitation of liability by having the tenant acknowledge that any redress against the landlord is limited to the landlord's interest in the center and that no recourse can be had to the private properties of any employees, members, partners, officers, or directors of the landlord. Often, if there has been a transfer of title since the original lease was executed, the original lease may not have contained the limitation language because it was not a concern to an already protected or single purpose entity landlord.

Has the landlord's or the tenant's address changed since the original notice requirement? The lease amendment provides an opportunity to confirm where notices, rent, and copies should be sent.

Perhaps the most important consideration to a landlord in drafting an amendment for a lease extension is to incorporate estoppel language into the document. Often, a tenant will object to this provision, but if it is worded carefully, the tenant is likely to acquiesce and allow the landlord to add this protection. The goal of the landlord is to have the tenant confirm that, as of the date of the amendment: 1) the landlord is not in default under the terms of the lease; 2) the tenant has no defense, set-off or counterclaim to the enforcement by the landlord of the terms of the lease; 3) the landlord has satisfied all conditions of the lease required to have been satisfied, and 4) the tenant is not aware of any action or inaction by the landlord that would constitute a default by the landlord under the lease.

If drafted properly, a lease extension agreement can do more than just outline the financial terms of the renewal period. It can update information, modify or remove troublesome lease provisions, and estop the tenant from later claiming rights against the landlord. Care should therefore be taken to review the original lease to provide for a thorough and complete overhaul necessary to close any loopholes that otherwise may exist in the original lease documentation.

A sample form for a First Amendment to Lease appears below.

FIRST AMENDMENT TO LEASE

THIS FIRST AMENDMENT TO LEASE (this "First Amendment") is made and entered into as of this ____ day of _____, 2006, by and between REAL PROPERTY, LLC, a Delaware limited liability company ("Landlord"), and RETAIL STORE, INC., a Delaware corporation ("Tenant").

WITNESSETH:

WHEREAS, Landlord's predecessor-in-interest, Former Landlord LLC ("Former Landlord"), and Tenant entered into that certain Agreement of Lease dated as of _____ (the "Lease"), whereby Former Landlord leased to Tenant the premises described therein, measuring approximately _____ square feet (which has since been remeasured and is acknowledged to actually be _____ square feet) (the "Premises") in Town Plaza, Anytown, Illinois (the "Shopping Center"), for a term currently set to expire on _____; and

WHEREAS, the parties desire to extend the term and amend the Lease on the terms and conditions provided herein.

NOW, THEREFORE, in consideration of Ten Dollars (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Landlord and Tenant agree that the Lease shall be amended as follows:

Incorporation of Lease Terms. The terms, conditions and covenants of the Lease are incorporated herein by this reference except to the extent expressly modified herein.

Definitions; Rules of Usage. For purposes of this First Amendment initially capitalized terms used herein and that are not otherwise defined herein shall have the same meanings as are ascribed to such terms in the Lease.

Extension of Term. The term of the Lease is hereby extended for five (5) years, commencing on January 1, 2007 and expiring on December 31, 2011 (the "Extended Term"). For purposes of this First Amendment, all references to the term "Extended Term" shall be deemed to refer to the Extended Term as defined in this First Amendment.

Annual Basic Rental. During the Extended Term, Annual Basic Rental shall be as follows:

Period Annually Monthly

February 1, 2007 – December 31, 2009 \$120,000.00 \$10,000.00

January 1, 2010 – December 31, 2011 \$180,000.00 \$15,000.00

Annual Percentage Rental. During the Extended Term, the Breakpoint shall be \$800,000.00.

No Further Extensions. Tenant acknowledges that except for this First Amendment, Tenant has no extension rights under the Lease.

Limitation of Landlord's Liability. Redress for any claim against Landlord under the Lease and this First Amendment shall be limited to and enforceable only against and to the extent of Landlord's interest in the Shopping Center. The obligations of Landlord under the Lease and this First Amendment are not intended to and shall not be personally binding on, nor shall any resort be had to the private properties of, or any beneficiaries, stockholders, employees, or agents of Landlord.

Representation and Release. Tenant hereby represents and warrants that no default under the Lease by Landlord exists, that no state of facts exists which with the passage of time or the giving of notice or both would constitute a default by Landlord and that no sums or credits are due Tenant from Landlord except adjustments, if any, of estimated rents and charges for the current Lease Year in accordance with the Lease. Tenant hereby releases Landlord and Landlord's managing agent and its and their respective partners, directors, officers, employees, agents and contractors from any and all claims, liabilities, damages and costs arising out of or in connection with the Lease or Tenant's use and occupancy of the Premises and the Shopping Center through the time of full

execution and delivery of this First Amendment by both of the parties.

Notice to Landlord. Any notices required to be sent to Landlord shall be directed to Real Property, LLC, c/o Property Manager, Inc., 123 Main Street, Chicago, Illinois 60601, Attention: Mall Management Office, Mall Manager, with a copy to Real Property, LLC, 456 Main Street, Attention: John Doe, or such other address as Landlord shall have last designated in writing to Tenant. All rent and other payments shall be sent to: Real Property, LLC, 456 Main Street, or to such other entity or person as Landlord may direct by notice in writing to Tenant, from time to time.

Brokers. Each of the parties hereto represents and warrants that there are no brokerage commissions or finders' fees of any kind due in connection with this First Amendment, and each of the parties hereto agrees to indemnify the other against, and hold it harmless from, any and all liabilities, damages, costs, claims and obligations arising from any such claim (including, without limitation, the cost of attorneys' fees in connection therewith).

Damages. Notwithstanding anything in the Lease to the contrary, in no event shall Tenant be entitled to sue Landlord for any consequential or punitive damages (including, without limitation, any claims for lost profits and/or lost business opportunity).

Assignment. In the event of a permitted assignment, Tenant shall remain liable for all of the obligations of Tenant arising out of the Lease and in no event shall Tenant be released of any liability under the Lease as a result of any of the transfers set forth in Paragraph 9 of the Lease. Landlord hereby accepts Tenant as the successor in interest to the Tenant originally specified in the Lease. Tenant hereby agrees to be bound by all of the terms and conditions of the Lease as if it were the original Tenant; however, Landlord does not release any and all obligors, guarantors, tenants or other parties who were Tenant's predecessors in interest or were in any way liable under the terms of the Lease or other related documents, including without limitations any guaranties, from any liability under the Lease.

Construction. Tenant hereby acknowledges and agrees that Landlord has satisfied all of its construction obligations contained in Paragraph 5 of the Lease.

Full Force and Effect. Except as modified herein, all other terms and conditions of the Lease shall continue and remain in full force and effect. In the event of any conflicts or inconsistencies between the terms and provisions of the Lease and the terms and provisions of this First Amendment, the terms and provisions of this First Amendment shall govern and control in all respects.

Counterpart Execution. This First Amendment may be executed in any number of counterparts and by each of the parties hereto in separate counterparts, all such counterparts together constituting but one and the same instrument.

IN WITNESS WHEREOF, Landlord and Tenant have respectively signed this First Amendment as of the date first hereinabove set forth.

LANDLORD:

TENANT:

REAL PROPERTY, LLC,

RETAIL STORE, INC.,

a Delaware limited liability company

a Delaware Corporation

By: _____

By: _____

Its: _____

Its: _____

CONSENT OF GUARANTOR

Guarantor hereby expressly agrees that he shall continue to be liable for the performance of all covenants and conditions of the Lease and any amendments, modifications, renewals of the Lease (including, specifically, those made hereby) to be performed by Tenant, including, specifically, the payment of Rental and all other charges and payments to be made under the Lease, as modified herein. Guarantor joins in the execution hereof to evidence his consent hereto and continuing obligations with regard to the Lease.

John Smith

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