

Avoid Damages in Commercial Lease Disputes

By Justin Lamontagne | November 25, 2013

Imagine the following: You're a commercial landlord. It's the first of the month and the rent check didn't come. You visit your tenants and the doors are locked. The lights are off. The furniture and equipment are in disorder but, for the most part, still there. Your phone calls are not returned. Emails bounce. Cue the Freddy Krueger music; this is every landlord's nightmare. They're gone.

Unfortunately, stories like this are not uncommon in the commercial real estate world. Particularly during down markets like we've experienced the last five years or so. To make matters worse, there can be very serious legal implications for property owners if the matter is not handled properly. If you are involved in a tenant dispute or have what appears to be an abandoned premises, it can be a delicate matter, and taking the wrong steps can expose you to damages and costs. As such, I'd advise you to speak first to an attorney. I traded some emails with Hawley Strait, a commercial and real estate attorney at Bernstein Shur, to discuss a few important tips.

In regard to the scenario described above, Strait says that, "a well-written lease should provide the landlord with the right to seek damages from the tenant if it fails to properly vacate the premises and/or it leaves behind furniture, trash, equipment, etc. The landlord should have the right to collect from the tenant the cost of removing the items, but more importantly, if the tenant's personal property is left behind there are certain measures the landlord is obligated to take, including properly notifying the tenant at its last known address of the existence of the abandoned property and the landlord's plans to dispose of it."

Strait says that many landlords think they can clean the place up, get rid of the property, change the locks and shut off the utilities. But such actions violate Maine law and will expose a landlord to the potential for serious and costly damages.

"In addition," Strait continues, "the landlord should contact any known creditors of the tenant who may have rights or claims to the property, and in all cases, the landlord should properly document and itemize all belongings left behind through photographs or other evidence and what efforts the landlord has taken to notify the tenant about its property."

Avoiding default

I also wanted to clarify some misconceptions the public may have when it comes to "default." Both landlords and tenants can be found in default of a lease but, it's important to note, that being in default does not necessarily terminate the lease contract. Strait explains, "Termination is an extraordinary remedy, and Maine law generally requires the lease to expressly provide for termination for a default, and if it doesn't, then that right does not exist. In the case of a landlord default, unless the tenant is able to negotiate a specific provision providing the tenant with a right to terminate, the lease will continue but the tenant will be entitled to whatever remedies are available under the lease, which is, in the typical lease, actually very little. When I negotiate a lease for a tenant, I typically ask for a 'self-help'

provision. This can provide the tenant with a remedy for the landlord's default by allowing the tenant to take matters into its own hands to fix a leaking roof or respond to other neglected landlord maintenance obligations."

Hawley's self-help clause is a provision that I do not see in enough leases. We've all heard about slumlords who do not properly maintain or repair their properties. Imagine a 50,000-square-foot manufacturer who's trying to work in a property with a leaking roof. If the replacement cost is \$100,000, it's possible the property owner won't (or can't!) pay for a new roof. In this instance, a well-written self-help clause in the lease could allow the tenant to pay for the roof repair and then demand reimbursement from the landlord, or in some cases, (depending on the terms of the self-help provision) deduct these expenses from future rent payments under the lease.

Commercial real estate has inherent risks. When it comes to legal matters, seek the advice of a professional. I did and want to thank Hawley Strait for his insight. He can be reached at hstrait@bernsteinshur.com.

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