

To Consent or Not to Consent, That is the Question – (Leases and the Landlord’s Consent to Assignment)

Business leases often prohibit a tenant from assigning the lease or subletting the premises without the landlord’s written consent. What happens, however, if the landlord behaves unreasonably in deciding whether to consent? To address this very concern, the careful tenant will often add language to the effect that “the landlord’s consent shall not be unreasonably withheld.” But what if the lease itself doesn’t include that language? That question has been confronted head on by one of Florida’s intermediate appellate courts. The following circumstances and decision in that case certainly shed light on the answer:

In the middle of the term of a commercial/business lease, the landlord ended up selling the leased property to a third-party, who by that sale became the new landlord. At around the same time, the tenant entered into an agreement for the sale of their business, which was contingent on the landlord’s consent to a lease assignment. When the new landlord refused to consent unless the new tenant would pay an additional \$250/month in rent, the deal to purchase the business fell apart. The tenant ultimately fell behind in their rent, and the landlord sued. That suit was met by a claim by the tenant alleging that the landlord had improperly refused to consent to the assignment, damaging the tenant through a loss of the sale/purchase of its business. The trial court found for the landlord. The tenant appealed, and the appellate court reversed.

In reaching its conclusion that the landlord had improperly refused to consent to the assignment despite the absence of language in the lease that “the landlord’s consent shall not be unreasonably withheld,” the court recognized as follows:

[A] lease is a contract ... and, as such, should be governed by the general contract principles of good faith and commercial reasonableness. One established contract principle is that a party’s good faith cooperation is an implied condition precedent to performance of a contract.... [In the lease context, a landlord] may not arbitrarily refuse consent to an assignment of a commercial lease which provides, even without limiting language, that a lessee shall not assign or sublease the premises without the written consent of the [landlord].... A withholding of consent to assign a lease, which fails the tests for good faith and commercial reasonableness, constitutes a breach of the lease agreement.

The following factors were identified as properly considered in determining whether consent is reasonably withheld: (a) financial responsibility of the proposed subtenant, (b) the “identity” or “business character” of the subtenant, i. e., suitability for the particular

building, (c) the need for alteration of the premises, (d) the legality of the proposed use, and (e) the nature of the occupancy, i. e., office, factory, clinic, etc. However, “denying consent solely on the basis of personal taste, convenience or sensibility or in order that the landlord may charge a higher rent than originally contracted for” is improper.

In the end, while it remains advisable for a business tenant to have language requiring a landlord’s refusal to consent to an assignment to be reasonable, that requirement may exist whether or not it’s actually written in the lease. The landlord should therefore proceed with appropriate caution or make sure that their lease provides them with a lot more than simple silence.

By: Andrew M. Feldman, Esq.

E-mail: AFeldman@AMFLegal.com

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