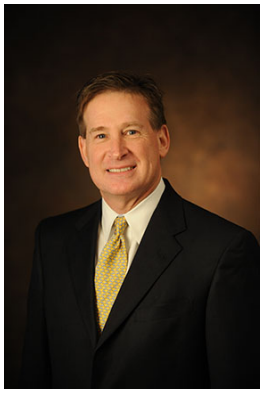
COMMERCIAL LEASING (times two)



COUNSEL'S CORNER

1. Arbitration

On March 15, 2001, 175 Broad Street LLC (landlord) entered into a five-year lease with The Nead Organization, Inc. (tenant) for 12,017 SF in a commercial building. The lease was amended and extended in September 2005.

The holdover provision stated that if Nead continued occupancy after March 31, 2011 without the Landlord's consent, then Nead would pay double the amount of base rent.

Nead was evidently not ready to vacate by the end of the stated lease term. Nead actually paid double rent from April through July 2011, but then stopped paying rental altogether. Nead ultimately vacated the premises on August 16, 2011.

175 Broad sued Nead for breach of the lease. 175 Broad alleged that Nead vacated the premises without proper notice, failed to pay rental and other charges, neglected to remove fixtures and failed to restore the premises to its original condition. 175 Broad alleged total damages of $224,468.

Shortly after 175 Broad filed its lawsuit, Nead asked the court to dismiss the complaint, citing a mandatory arbitration provision contained in the lease. 175 Broad defended by claiming that the arbitration provision was not intended to cover money disputes.

The court agreed with Nead and dismissed the lawsuit. 175 Broad appealed.

The Court of Appeals reviewed the arbitration section closely, which stated: "All disputes under this Lease, other than those relating to the payment of rent or other charges by Tenant, must be submitted to arbitration."

Concluding that a part of the dispute related to rent but other claims did not, the Court of Appeals agreed that, regardless, the case must be dismissed to allow the parties to pursue arbitration.

The tenant Nead won and the lawsuit was dismissed. See *175 Broad Street, LLC v. The Nead Organization, Inc.;* Docket No. A-3600-11T4; Superior Court of New Jersey – Appellate Division; January 10, 2013.

The results of the arbitration were not publicized.

2. The Pain of Non-Payment

N. Providence LLC leased property to The Great Atlantic & Pacific Tea Company, Inc. Some of you will recognize the tenant as "A&P." In the Lease, A&P promised to construct a new grocery store for itself in the shopping center, and Providence agreed to pay A&P a construction allowance of $1.9 million within 90 days following the date that A&P opened its store.

A&P opened for business on September 24, 2010, thereby giving Providence 90 days or until December 23, 2010 to pay the construction allowance. Providence secured a loan from UBS and advised A&P that it was ready to fund the $1.9 million allowance.

All was proceeding well. Until A&P filed bankruptcy on December 21, 2010. UBS informed A&P it was prepared to fund the construction allowance as soon as A&P assumed the Lease in the context of the bankruptcy proceeding.

A&P then assumed the Lease. Six months later. On June 22, 2011.

The first obvious result was that the construction allowance wasn't funded within the 90-day window. The second not-so-obvious result was that A&P withheld all rent and other charges from December 23, 2010 (the last day to properly fund the construction allowance) until September 29, 2011 – being the date the allowance was finally paid.

Providence filed a lawsuit against A&P, claiming that the $1.9 million allowance must be reduced by the amount of rent withheld. The court ruled for A&P in holding that the Lease plainly stated no rental was due until the construction allowance was paid.

Providence appealed.

It took 20 pages for the appellate court to decide that indeed A&P had the right to withhold rent payments to Providence. And that A&P's bankruptcy filing and delayed receipt of the construction allowance had saved A&P a substantial sum. See *The Great Atlantic & Pacific Tea Company, Inc. . N. Providence, LLC;* Case No. 13-CV-5588 (CS); United States District Court – Southern District of New York; April 28, 2014.

And this makes me wonder if the A&P bankruptcy filing was followed by Providence's bankruptcy filing. How many landlords can survive without rental payments for nine months relative to a 'big box' lease?

Lessons learned:

1. I am not a big fan of arbitration and usually I work to delete the provision regardless of the side I am representing. Yes a case can be resolved faster in arbitration, but at significantly greater expense and then the winner receives an "Award" which is unenforceable without filing litigation too. I prefer litigation over arbitration. But even when arbitration is appropriate, be careful how the provision is drafted to avoid unintended results.

2. The A&P case involved two uber-sophisticated parties, yet the offset / abatement language wasn't as clear as it might have been to prevent this catastrophic result. Lawyers and parties cannot think through every possible scenario. Such as the tenant's bankruptcy that delayed the landlord's construction allowance payment and the unintended results that followed.

3. Do you see the relationship between these two cases? I should have captioned this article ***Unintended Consequences***.

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