

IS YOUR RENEWAL NOTICE SUFFICIENT?



COUNSEL'S CORNER

Town and Country Center, Inc. owns property in Marion Illinois. T&C had a lease with Rax of Marion, Inc., whereby Rax leased the property from T&C. On December 1, 1993, Rax assigned its rights as tenant to Sher-Jo, Inc.

On July 26, 1994, T&C and Sher-Jo amended the lease to extend the term for 20 more years beginning January 1, 1994. As well, the amendment allowed Sher-Jo the right to extend the lease term for five more years, if the option was exercised at least 180 days prior to the end of the then-current term.

The math works out to July 4, 2013 – that was the last day that Sher-Jo was afforded the right to extend the term.

On September 1, 1994, Sher-Jo subleased the property to Fazoli's Restaurants for a 10 year sublease term, with three 5-year option renewal terms. T&C approved the sublease, but otherwise T&C was not a party to it.

On May 31, 2013, Fazoli's sent a letter to Sher-Jo stating that Fazoli's was exercising its first sublease renewal option. On June 4, 2013, Sher-Jo faxed to T&C a copy of Fazoli's letter. Sher-Jo verbally confirmed with T&C that T&C received the fax and at that time, verbally advised T&C that Sher-Jo also needed to exercise its five-year renewal option.

Other than the Fazoli fax, no other correspondence was sent to T&C prior to the renewal deadline of July 4, 2013. Two weeks later (July 18, 2013), Sher-Jo sent T&C a letter by email and US certified mail, formally advising of Sher-Jo's intent to renew the prime lease.

T&C, believing that Sher-Jo was required to furnish notice by registered US mail (since that is what the prime lease said) and that in any event, Sher-Jo's letter of July 18

was two weeks too late, ignored Sher-Jo's letter and instead entered into a direct lease with Fazoli's.

In response, Sher-Jo sued T&C, claiming that Sher-Jo had effectively renewed the prime lease through Sher-Jo's substantial compliance with the prime lease, and T&C had no legal means to ignore Sher-Jo's lease renewal and instead deal directly with Fazoli's.

The trial court granted judgment to Sher-Jo, concluding that the June 4 fax from Sher-Jo to T&C (recall that the fax was only Fazoli's exercise of its sublease renewal term) satisfied the notice requirements of the prime lease.

T&C appealed.

There was no dispute that the phone calls and fax were sent within the time required by the prime lease. The sole issue was: Did the tenant Sher-Jo comply with the terms of the renewal option exercise in the prime lease?

The Appellate Court reviewed the fax, which references only an extension of the sublease between Sher-Jo and Fazoli's. Sher-Jo argued that Fazoli's was authorized to send a notice on behalf of Sher-Jo to T&C. While that may or may not have been true, the notice that was actually sent did not reference Sher-Jo's option exercise. Only Fazoli's.

The Appellate Court found that Sher-Jo did not send written notice of its desire to exercise its option to extend the prime lease within the requisite timeframe. Oral notice does not excuse the failure of Sher-Jo to strictly comply with the terms of the renewal option and notice provision in the prime lease.

The circuit court's decision was reversed. T&C wins; Sher-Jo loses; T&C may directly lease the property to Fazoli's or anyone else as Sher-Jo's prime lease term expired December 31, 2013.

See *Sher-Jo, Inc. v. Town and Country Center, Inc.*; Case No. 5-16-0095-U; 5th District Appellate Court of Illinois; July 31, 2017:
http://www.illinoiscourts.gov/R23_Orders/AppellateCourt/2017/5thDistrict/5160095_R23.pdf.

Lessons learned:

1. This Illinois Appellate Court concluded that commercial tenants who seek to exercise a renewal option must *strictly* comply – not *substantially* comply – with the terms of the lease. Those terms include not only timing elements, but also the manner in which notice must be sent.
2. I have seen recent situations where commercial tenants engaged commercial brokers, agents and REALTORS® to assist with lease renewal negotiations. If the agent doesn't understand the law and hasn't read the lease, then malpractice

claims can be asserted against the agent if the tenant is disadvantaged when the landlord doesn't accept tenant's late renewal notice. This may be so even though the agent was working with the landlord relative to the terms of the renewal, and inadvertently let the formal renewal date slide thinking (knowing!) that surely better renewal terms for the tenant would be received with just a few more days of negotiations.

3. Are you helping a landlord or tenant negotiate a new commercial lease? Don't overlook the notice 'boilerplate' provisions. No one uses faxes anymore. Change the notice provisions to allow notices to be sent by scan and email, provided they are also sent within the following three days by certified mail or overnight courier service.

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