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COMMERCIAL LEASE NEWSLETTER

EXECUTION OF LEASE DOCUMENTS AND SIGNATORS

Oftentimes in regard to the execution of commercial leases, clients are requesting that the lease be in the name of an LLC or some type of business entity. This is done for a number of reasons, inclusive of liability for the parties. In fact, generally it is a preferred method for a tenant to take the leasehold interest to avoid personal liability, notwithstanding the fact that there maybe insurance obtained by the tenant for its operation of the premises.

When a lease is entered into with an LLC or other type of entity, the most likely requirement of all sophisticated business clients is that the tenant execute the lease in the capacity of the entity (either as president of a Florida Corporation, managing member of an LLC, or managing partner of a limited liability partnership, etc.) In addition thereto, most sophisticated landlords use a sound business approach and require the principal or principals of the Florida Entity to sign a personal guaranty. Landlord issues may arise, both in the execution of the underlying lease, and subsequently in the execution of the guaranty. This newsletter will focus on problems arising from the execution in both of those scenarios.

PREPARATION OF THE LEASE – AMBIGUITIES CONSTRUED AGAINST MAKER

Generally commercial landlords draft their own leases. I am amazed that many of the commercial property managers that I deal with, and who contact our office, expect there to be a standard "form" commercial lease. Unlike residential leases in which the Florida Supreme Court has approved a form which is generally focuses on basic concepts such as occupancy and rent per month, a commercial lease significantly more detailed. A commercial lease should contain business specific provisions in the lease. Commercial property managers who believe there is a "one form fits all lease" should reconsider that position. With that said, and as indicated above, the lease needs to be clear and concise, since any ambiguity in the lease is going to be construed against the maker Sterling J. Planck, Sr. v. Southport Boat Storage and Sales, Inc. 387 So. 2d 440 (4DCA 1980). This rule is even more pronounced when the drafter is in a position of trust or greater personal knowledge, such as a commercial landlord. Id.

INTENT AS TO THE NAME OF THE TENANT AND THE GUARANTORS

In most circumstances, when dealing with a commercial lease, the commercial tenant will be a business entity. The business entity should be in existence and the name of the entity should be verified by having to check the name of the entity and its status on www.sunbiz.org to determine:

1. The exact legal name of the entity;

2. The principals of the entity, and their designation (such as the designated manager);

3. The existence of the corporate entity, since a corporate entity that is dissolved does not have the authority to engage in executor contracts such as leases.

DESIGNATION OF SIGNATOR

A signature block for a commercial lease should also identify specifically the entity that is designated as the tenant, as well as the representative with authority who is signing on the behalf of the business entity/tenant.

SIGNATURE AND CAPACITY OF SIGNOR

In certain circumstances both the lease as well as the guaranty may be inappropriately signed. For example: a lease could be in the name of "ABC, LLC" and based upon the review of www.sunbiz.org and the public records of State of Florida, the managing member of ABC, LLC is "Jane Smith". Jane Smith should then sign in the capacity as "manager". The best approach would be for her to sign as "Jane Smith, as manager". The same concept applies if she was signing "Jane Smith, as president" of a Florida Corporation.

If the document is signed without the designation of the person signing in their representative capacity, then the presumption under Florida Law is that the person signing the document would be signing in their individual capacity. Betz v. Bank of Miami Beach 95 So. 2d. 891 (Fla. 1957). This proves to be even more problematic when the lease drafter is the one who improperly signs the lease. If that occurs, we end up having either:

a. Not the appropriate corporate/business representative signing the document and not binding the business entity, or;
b. The person signing without the "descriptio personae" being personally liable), neither is the intended result.

ISSUES WITH IMPROPERLY SIGNED LEASES

In addition to the possible unenforceability of the lease by either the landlord or the tenant based upon the lack of proper execution, there is also an issue of the person signing the document as being personally liable for the obligation of the lease, be it as commercial landlord or commercial tenant. This not only has a significant bearing on issues as it relates to obligations under the written lease for various contractual rights, but also creates a potential issue in the event that there is any liability or insurance claims as arising out of the operation of the lease against the landlord, tenant or both. An improperly signed lease can create some significant personal liability when none was originally intended.

As indicated above, and consistent with the landlord's intent to obtain an individual's personal guaranty for a business entity's lease, the landlord should have a separate and distinct written lease guaranty to be executed by the president or the principal who the landlord is relying upon to provide additional security for the payment of the corporate debt. Often times, the lease ends up being signed improperly.

Using the same scenario above with the lease being an ABC, LLC, often times it is overlooked that the guaranty, to be done by Jane Smith in an individual capacity ends up being signed by Jane Smith with some type of descriptio personae behind her name such as "Pres.", "Mgr." or some other designation. Once that happens, then it raises the issue for the commercial landlord whether there was an intent by the person signing it to be personally liable for the debt because the person did not sign only in their individual name (this is just the mirror image of the corporate lease being signed in an individual capacity), which then allows for a claim that no personal liability was intended. This creates guaranty enforcement issues. Malt v. Carpet World Distributors 763 So. 2d. 508 (4DCA 2000).

Next month parol evidence to address ambiguities.