MANN REPORT
THE PEOPLE BEHIND THE DEALS IN THE NY REAL ESTATE SCENE

Small Commercial Leases

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"It's a small lease, just a couple of thousand square feet. We really don't think it should require a full lease negotiation. It's just a standard form. We'd like to sign and return it as soon as possible, so we don't lose the space."

Small commercial tenants find small commercial spaces all the time, and ask their lawyers to "look at the lease" and "tell us if it's OK." It's never OK. But what can anyone do about it?

These leases usually consist of a jumbled mess – a Real Estate Board of New York printed form (hence the "standard form" so it must be OK) supplemented by a rider that modifies the REBNY form, supplemented by a further rider that supplements the REBNY form and the first rider. The pile is just as thick for a small office space as it would be for a 250,000-square-foot warehouse. The multiple archeological layers – each a jaunt through the history of leasing – contain inconsistencies, archaic and incomprehensible language, and often no coherent order at all.

A small commercial tenant has neither the time, the money, the patience, nor the risk tolerance to endure a proper review and negotiation of one of these lease messes. But when some surprise jumps out of the lease 38 months later, then what?

And those surprises are inevitable. Leases like those described above are full of garbage clauses and worse. They start with provisions that are just unrealistic, overbearing and unreasonable. Perhaps they represent the landlord's response to landlord-tenant courts that landlords—not without reason—often regard as unrealistic, overbearing, and unreasonable as against landlords.

But these leases then often go many steps further, imposing restrictions and obligations that, if applied literally, would prevent the tenant from conducting its ordinary business operations during the lease term and selling its business when the time comes.

If the tenant and its counsel go to the effort of finding all those little surprises, the landlord and its counsel don't want to hear about them, or go to the time and trouble to think about them or revise the lease. And if that blows the deal, no problem – someone else who will pay less attention and just as much rent is waiting in the wings to take the space.

The exercise can consume entirely too much time, effort, and money, either jeopardizing good leasing transactions that shouldn't be jeopardized or sticking tenants with horrendous documents that make no business sense.

Someone – "they" – should figure out a better way to prepare and negotiate these leases. It has been suggested that someone should promulgate a "fair" and "user-friendly" and "balanced" and "short" model form of commercial lease – four adjectives that are not at all synonymous and rarely applicable to leases of the type described in this column.

Printed lease forms sometimes achieve at least some of those goals. Today, though, they seem to have largely just become the foundation for massive towers of leasing paper. And printed leases have plenty of deficiencies, too.

Landlords and their counsel might do well to try cut away large parts of the accumulated encrustation, in favor of simple and straightforward lease language that gives the landlord a package of meaningful protections, rights and remedies that any landlord reasonably needs. The lease also shouldn't be so restrictive that, if applied literally, the tenant cannot conduct its business and live its commercial life.

A tenant who faces one of the bad leases described in this column won't be able to change the world of small commercial leases. If the tenant walks away from one lease, probably the next lease will be just as bad, maybe worse.

Any such tenant needs to pick its battles. To keep the exercise under control, the tenant may want to tell its counsel just to look for significant major time bombs that lurk in the lease – maybe just the top ten. Those would relate primarily to anything that, as a practical matter, would prevent the tenant from conducting business, or would produce major unexpected costs and risks that make no sense. The tenant will probably also want to tell counsel to make sure any personal guaranties say only what they should say – thus perhaps preventing one of the largest "gotcha" problems in any commercial lease.

Beyond these major problems, often the lease has so many other problems that if counsel tries to do anything about them, the exercise will become entirely inappropriate and disproportionate given the tenant's expectations, timing, and leasing budget.

If the tenant settles for anything less than a full lease review, they need to remember that they settled for less than a full lease review. The "top ten" problems that counsel found won't include the eleventh and twelfth problems – the problems that inevitably end up happening and costing the tenant money.

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