



COVID-19 Leasing Issues:

Considerations and Practical Guidance for Landlords and Tenants

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COVID-19's Impact on Leasing

- We'll discuss:
 - ✓ What to look for in commercial leases for potential relief from/protection against COVID-related issues
 - ✓ Options for restructuring leases between landlords and tenants
 - ✓ Options for commercial and residential landlords if a tenant stops paying rent
- Focus here will be on the Atlanta/Fulton area
- This presentation is focused toward nonprofit landlords and tenants – however most concepts discussed here apply equally to nonprofits and for-profit businesses, but any distinctions will be noted

What to look for in your lease (Commercial Leases)

- In the context of commercial leases, whether you're a tenant seeking relief or a landlord wondering how strong your position is – the first question is always “what does your lease say?”
- **Force Majeure** – A concept in contract law that exempts one or both parties from fulfilling their contractual obligations due to unforeseeable circumstances beyond their control. Force majeure will often apply to what are commonly known as “acts of God” but it can also apply to unforeseeable acts of people, such as theft, vandalism, acts of war or terrorism.
 - Does the provision contemplate pandemics/epidemics?
 - Is performance required to be impossible or only impractical?
 - Notice Requirements?
 - Mitigation Requirements?
 - Payment of rent typically not excused in any event

Example of a Force Majeure Provision

- *Neither Landlord nor the Tenant shall be responsible for any loss or damage, or delay or failure in performing hereunder arising from: act of God, act of war, act of public enemies, pirates or thieves, arrest or restraint of princes, rulers, dictators, or people, or seizure under legal process ...; strikes or lockouts or stoppages or restraints of labor from whatever cause, either partial or general; or riot or civil commotion.*

What to look for in your lease (Commercial Leases) cont.

➤ **Operating Hours**

- ✓ Does the lease require the tenant to operate for a minimum number of hours for a minimum number of days? If so, this should remain enforceable. Similarly, if the lease requires a landlord to keep a building open and/or operational during certain times, that should also be enforceable.

➤ **COVID Cleaning**

- ✓ Can a landlord obligate a tenant to do a deep clean of its premises if one of the tenant's employees has reported contracting the virus? Ask:
 - Is tenant obligated to maintain its premises in good order and repair?
 - Is tenant obligated to take steps to ensure their business does not interfere with the landlord's operation of the space or other tenants' business?

No force majeure? What legal relief is available outside of the lease?

- More questions than answers
- Is COVID-19 an “Act of God”?
 - ✓ Georgia courts held that the economic downturn of 2008 was not an “act of God”
- Do other Georgia legal doctrines apply?
 - ✓ Frustration of Purpose?
 - ✓ Impossibility?
- All issues likely to be litigated in the future

Lease Restructuring *aka “Compassionate Collection”*

- If no relief is available under the lease or at law, tenants may try to negotiate with their landlords for lease amendments that will ease the burdens of paying rent for a shuttered or stifled business.

- A wide variety of lease modifications are possible, including:
 - ✓ Partial or total rent abatement
 - ✓ Rent deferral (in which rent may be omitted for several months, but must be made up by extra payments thereafter)
 - ✓ Early termination of leases.

Lease Restructuring

Considerations for Landlords

- Lease restructuring can be mutually beneficial – in any negotiations for rent abatement or deferrals, Landlords should consider asking for:
 - ✓ Term extensions;
 - ✓ Removal of purchase options, termination rights, or other similar provisions that make the property less marketable;
 - ✓ Adjustment of tenant security deposits or letters of credit;
 - ✓ Addition or increase of “percentage rent”;
 - ✓ The addition of personal or corporate guaranties; and
 - ✓ Reallocation of any remaining tenant improvement allowances.

Lease Restructuring

Considerations for Landlords cont.

- Beware the handshake agreement and get any modification in writing as a formal lease amendment that indicates (i) what changes are being agreed to (ii) for how long and that (iii) no other obligations under the Lease are being waived.
- Many mortgages on commercial real estate require lender approval for all material lease amendments.
- If the lease is a sublease, consent of the master landlord will usually be required.
- If the lease is supplemented by a guaranty, the consent of the guarantors will likely be necessary to protect against the possibility of their being discharged by lease modification.

Future Considerations

for next time you sign a commercial leases

➤ **Force majeure provisions**

- ✓ Consider adding pandemic/epidemic language

➤ **Insurance provisions**

- ✓ The parties may wish to consider a detailed review of the insurance provisions to assess whether a rent suspension may apply where the property is rendered inaccessible by insured risks including pandemic or outbreak of infectious disease.

➤ **Service Charges**

- ✓ As a Tenant, consider seeking service charge caps to guard against increased costs arising from protective measures such as more frequent and thorough cleaning.
- ✓ As a landlord, seek to have service charge provisions drafted in more general terms, enabling recovery of costs incurred in the interests of good estate management.

Options for a Landlord if a Commercial Tenant Stops Paying Rent - Eviction

- Always look at the lease first to determine notice requirements for any tenant default.
- Follow Georgia/local law for proper eviction proceedings
- There are currently no moratoriums on commercial evictions in Fulton County.

Options for a Landlord if a Residential Tenant Stops Paying Rent - Eviction

- Options for evicting residential tenants are more limited.
- As of September 4, 2020, the Centers for Disease Control published an Eviction Moratorium, effective until December 31, 2020
- To qualify for the protections, renters must provide a declaration that they:
 - ✓ Have lost “substantial” income during the pandemic;
 - ✓ Expect to make no more than \$99,000 in 2020 or qualified to receive a stimulus check;
 - ✓ Are making their “best efforts” to make partial rent payments and get government assistance;
 - ✓ And that an eviction would force them into homelessness.
- **All Rent Remains Due**

CDC Moratorium on Evictions

- Tenant is not required to file a certification with the court
 - ✓ However - it is considered “sworn testimony,” meaning a tenant can face charges or pay a fine if they aren’t truthful.
 - ✓ Landlord is required to provide the court an affidavit that it has not received a declaration from a tenant under the CDC moratorium if it proceeds with eviction.

- Fulton County currently has no other COVID-related restrictions on evictions – so unless a tenant qualifies under the CDC Moratorium they can still be evicted and hearings are currently being held via Zoom in Fulton County.

- **Note:** Each jurisdiction in Georgia is responding to the Moratorium in its own way – some counties have halted all residential evictions as they determine how to implement the Moratorium – it is important to check with your local jurisdiction before proceeding with an eviction.

Thoughts/Open Questions re: CDC Moratorium

- Is prohibiting evictions a one-sided remedy?
 - ✓ The moratorium appears to be based on the assumption that landlords are better able than tenants to absorb the economic losses involved.
 - ✓ Not all commercial/non-profit landlords are large firms with deep financial pockets and most have loan payments.
 - ✓ Is a flood building up under the dam?
 - ✓ A moratorium on evictions may make sense temporarily, but in the long run, a more equitable division of losses or further governmental financial support may be called for.

What if your Landlord goes out of business?

- **Short answer:** Just because your landlord has filed for bankruptcy or is in foreclosure does not typically excuse a tenant from making rent payments. Someone is due to get paid for your tenancy in the property. If you are confused about who to pay, or are receiving requests for payment from multiple parties, ask that the money be placed in an escrow account until you can verify the appropriate party to pay.
- The exact proceedings for a tenant whose landlord has gone out of business will depend on applicable bankruptcy and/or foreclosure laws and it is recommended that a tenant discuss their particular circumstances with counsel

Georgia Housing Laws

- Domestic abuse has risen worldwide due to the COVID-19 epidemic
- Note: There is a housing law in Georgia that allows a residential tenant to terminate their lease before it expires if they are a victim of family violence and have a family violence protection order.

“Take Aways”

- In the commercial sphere, the first question to ask as to whether a tenant has relief for COVID-related issues is “what does the lease say”?
- If no relief is available under the lease, there are several restructuring options that can be potentially beneficial to both parties. *Communication is Key.*
- If a Landlord moves to evict a tenant, take special caution, particularly in the residential sphere, and ensure compliance with the CDC Moratorium.
- Government intervention measures will not last forever and there remain many questions as to what awaits when such measures are lifted. The 'new normal' is still being defined and it will require landlords and tenants to adapt and collaborate in new ways to foster the recovery of the residential and commercial real estate markets.

Questions?



For More Information:

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