



# nerej

## **Landlords and tenants should carefully consider accelerated rent clauses in Mass. commercial leases**

July 25, 2013 - Spotlights

As experienced commercial landlords and their counsel know, Massachusetts courts uphold clauses in leases which give landlords the right to accelerate rent for the remainder of the term of the lease upon certain types of defaults by tenants, even when it is likely a landlord will find a replacement tenant before the lease in question was scheduled to end. The clauses are common in Massachusetts leases.

In allowing landlords to recover what a tenant or guarantor of a lease may believe in good faith and which courts in other jurisdictions have decided is an extraordinary sum, courts consider each case and look for certain factors to be present when such provisions are challenged. Judges want to ensure the parties to a lease are sophisticated and understand the impact of the remedy; there is no evidence of fraud or unconscionable conduct on the part of the landlord when the lease is entered into; and that the nature of the default that could result in a landlord receiving all remaining rent for the balance of the term is limited to those defaults considered to be significant. Examples of significant defaults include: (i) the failure to pay rent, (ii) abandonment of the demised premises, and (iii) assignment of the lease to a third party without landlord's consent.

Courts have found the accelerated rent clause to be a valid and enforceable liquidated damages provision. They reason that certain lease damages are difficult to ascertain at the outset of a landlord-tenant relationship; the accelerated rent sum represents a reasonable forecast of damages that may be expected to occur and not a penalty (because a landlord will receive the rent the parties contemplated, the amount declines over time and no one can predict the commercial rental market, the cost to locate a replacement tenant or length of the vacancy); and that an agreement to settle for the balance of the rental income the tenant promised to pay represents "peace of mind and certainty of result," which encourages efficient resolution, avoids delays associated with waiting for actual damages to be realized, and reduces litigation costs. But note that if the result could be uncertain (as in a 2013 Superior Court case involving a lease in which the landlord had the option to either seek accelerated rent or actual damages, which could be elected if greater), a judge may deny an attempt to recover accelerated rent.

Curiously, Massachusetts courts have not reduced the accelerated amounts sought by landlords to reflect the present value of receiving future rent earlier than provided for in a lease, or a reasonable estimate for rent a landlord might receive from a replacement tenant (after commissions, tenant improvements and concessions). Other jurisdictions and legal commentators do consider such reductions necessary to prevent a landlord from receiving a windfall.

Because it is well settled that Massachusetts courts have honored accelerated rent clauses, tenants are advised to carefully consider the costs and reimbursements that will comprise "rent," including projected real estate taxes, operating expenses, insurance costs and percentage rent, and to request appropriate adjustments to account for the present value of the rental income stream and the opportunity a landlord will have to release the tenant's space.

Likewise, a landlord should weigh whether recovering rent from the time of default to the end of the term will sufficiently compensate for losses he or she may incur following a tenant's default. In certain circumstances, payment of rent before the end of the lease term may not serve as sufficient compensation. Consider a shopping center owner seeking to maximize traffic for other tenants. The center's leases may contain percentage rent requirements or co-tenancy clauses which may be triggered by a tenant's departure and result in reduced rent or possibly a lease termination. Alternatively, the owner of a single-tenant property may sustain greater losses when the departure of his or her tenant causes a cancellation of insurance coverage or a substantial increase in insurance premiums. In addition, the landlord who is left with highly customized tenant improvements (which must be removed at great expense for the next tenant), may look to recover more than the balance of the rent which would have been paid, especially if the default occurs late in the term of the lease.

Once an owner determines that including an accelerated rent provision will be appropriate for its commercial property, careful attention must be given to the relevant lease provisions to put the landlord in the best position to recover payment after a qualifying tenant default, even if he or she believes there may be little to recover after a significant default. A landlord will want to promptly initiate action to maximize the likelihood and amount of recovery and will not be happy to be involved in protracted litigation just to prove he or she is entitled to the amount originally negotiated.

James Friedman, esquire, is a partner with Bernkopf Goodman LLP, Boston.

New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540