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Landlord consent and waiver: What landlords need to know

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Commercial landlords, already facing tenant defaults and rising vacancies, are concerned over the right to significant leasehold improvements following a default. For example, suppose you are the landlord of a local lifestyle mall and one of your tenants is a restaurant that borrowed a substantial amount to complete the purchase and installation of the kitchen and related leasehold improvements. With fewer people dining out, and the restaurant acknowledging declining revenue, you are concerned over a lender's right to repossess the collateral in the event of a loan default. If you signed a blanket landlord consent and waiver when the loan was funded, you may have unknowingly waived rights over the lender's repossession of the kitchen equipment.

As we discussed last month, a consent and waiver is an agreement between a landlord and a third party in connection with the third party's loan to a tenant of the landlord. Without it, the lender's right to repossess the tenant's leasehold improvements may be limited.

When fighting over the collateral, a lender will rely on its UCC filing with the state to establish its right to the collateral. The landlord will rely on its commercial lease and applicable state statutes. If there is no applicable statutory lien, sophisticated landlords may still have a lien based on the terms of its lease. For example, commercial leases often provide that alterations or improvements made to the leased premises remain the property of the landlord. Some leases go further and provide that the tenant upon execution of the lease grants the landlord a security interest in all of the tenant's property at the leased premises. The landlord consent and waiver subordinates the landlord's lien rights and allows the lender to remove the collateral.

Since commercial leases rarely obligate a landlord to execute a landlord consent and waiver, lenders typically enlist the tenant's help in securing the agreement. However it often falls to the lender to work with the landlord directly. Below are some points for landlords to consider before entering into a landlord consent and waiver.

Collateral Description: Avoid blanket descriptions of the collateral in question. The landlord should not waive rights to property other than what was financed by the lender.

Notice of Removal: The lender should provide written notice to the landlord prior to removal of collateral, and agree to remove the collateral within a defined period following a default under the loan. Chances are a default under the loan will be followed by a default under the lease.

Monthly Rent or Use and Occupancy: If the tenant defaults in the payment of rent under the lease, the Lender should pay monthly rent or a use and occupancy charge until it repossess the collateral. Without this agreement, the lender has the benefit of free storage of the collateral.

Indemnification: Insist on a broad indemnification by the lender for damages or suits arising out of the lender's repossession of the collateral.

Insurance: Require a certificate of insurance from the lender naming the landlord as an additional insured before repossessing the collateral.

No Auctions at Leased Premises:Â Restrict the lender from conducting an auction of the collateral at the leased premises.Â A landlord should not want potential bidders walking around the building during the inspection period and on the day of the auction.

Rules and Regulations:Â Require that the lender comply with all rules and regulations regarding the building. Â Such restrictions typically outline hours of operation and use of passenger elevators for moving equipment, etc.

As you can see, the usual landlord consent and waiver has significant implications and should not be entered into without careful review.

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