NEWS Release

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Have You Waived Your Rights Goodbye?

When a tenant defaults and a landlord wishes to terminate for the default, the landlord must be careful not to waive its right to terminate. Upon learning of a tenant default, a landlord must make a decision: does it want to terminate the tenant for the default or is it prepared to carry on with the tenancy? If it elects to continue with the tenancy, the landlord will still have the right to sue the tenant for any loss it may have sustained as a result of the default, such as the cost of repairs or for unpaid rent, but it may lose the right to terminate.

If the landlord elects to terminate it must ensure that it does so properly. Termination (also known as *forfeiture*) is a powerful remedy and the courts will scrutinize the landlord's actions to ensure that the termination was lawful. One of the pitfalls for landlords is they may waive their right to terminate without intending to or even realizing that they have done so. How does this happen? As we have already noted, upon learning of a tenant default, the landlord has an election: if decides it wants to terminate the lease for the default, then the landlord must treat the tenancy as being over as of the date it learned of the default. This means the landlord can no longer treat the defaulting tenant as a regular ongoing tenant. The tenant is in default and about to be terminated unless it remedies the default. If a landlord deals with a tenant in a manner that is consistent with a continuing tenancy, it may be found to have waived its right to terminate and be obliged to carry on with the tenancy... at least until the next default.

Waiver

The classic example of waiver is where a landlord accepts "fresh rent" after it learns of a tenant default. Fresh rent is rent that becomes due and payable after the landlord learns of the default. By accepting fresh rent the landlord is (whether or not it intends to) acknowledging the continuation of the tenancy after it learns of the default, and thereby waives its right to terminate for that particular default. This is a well established legal principle which was confirmed by the Ontario Court of Appeal in 1982 in *Royal Inns Canada Ltd. (Trustee of Estate of) v. Bolus-Revelas-Bolus Ltd.*

The Latest On Waiver

A recent case in Ontario has taken the degree to which courts will scrutinize the landlord's actions after it learns of a default entitling it to terminate, to a much higher level. In *Fitkid (York) Inc. v. 1277633 Ontario Limited* and *Living Properties Inc.,* the tenant stopped paying rent because of a disagreement over common area maintenance and tax charges, as well as a roof problem. The landlord issued a notice of default. After issuing the notice, the landlord continued to deal with the tenant as it had prior to the default. The landlord accepted rent for the month following the default, it continued negotiations with the tenant regarding roof repairs (even asked the tenant for a contribution to those repair costs), revised a former rent reconciliation statement and then issued a letter threatening collection proceedings if the tenant did not pay. It then proceeded to terminate the lease for the original default.

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The court held that the landlord's conduct amounted to a waiver of its right to terminate the lease for the earlier non-payment of rent. In particular, the court noted that engaging in negotiations with the tenant regarding the roof repairs, with knowledge of the monetary default, constituted a waiver by the landlord of its right to terminate the lease in relation to that monetary default. The court went on to say that even though the lease contained a "no waiver" clause (a clause which states that anything that the parties do should not be construed as a waiver of their rights under the lease or at law) it could not be used to help the landlord.

What happens, then, when a tenant calls after receiving a notice of default in an attempt to resolve the dispute or come up with a solution to a rental arrears problem?

As a result of this case, it seems that the landlord should not enter into any conversations whatsoever with the tenant except as those discussions pertain solely and directly to the tenant curing the default. The landlord can still insist that the default be cured and can continue to make demands that the tenant do so but the landlord must be careful not to cross the line and turn collection demands, or conversations requiring the tenant to cure the outstanding default, into an affirmation of the tenancy. However, in our experience, landlords are often reluctant to terminate leases and are willing at any stage of the game to enter into discussions with the tenant in an effort to resolve the dispute. How, then, can a landlord do so in light of this case?

Our Recommendation

To put itself in the best possible position to defend its actions, we recommend that the landlord (including its employees and agents) ***must***, at the very beginning of ***each and every*** meeting, phone or written discussion with the tenant, clearly state that the landlord considers the lease to be breached and that its agreement to discuss the breach with the tenant is without prejudice to its rights to terminate the lease for the default. We further recommend that the landlord have the tenant sign an acknowledgement to this effect before each and every meeting or conversation. ***In no event, however, should the landlord or its employees or agents enter into any other discussions relating to any other aspect of the tenancy as those discussions may have the effect of nullifying the landlord's termination right for the default.***

Any discussions that the landlord might want to engage in with the tenant should be prefaced in the manner outlined and the landlord should always be cognizant of the danger that anything which it says or does can (and may be!) held against it as amounting to a waiver.

Good News!

Two of the 3 finalists in NAIOP's 2002 Office Lease Deal of the Year contest were lease transactions handled by our firm on behalf of Brookfield Properties Ltd. And, one of the 3 finalists in NAIOP's 2002 Industrial Lease Deal of the Year contest was a lease transaction handled by our firm on behalf of BMW Canada Inc.

Congratulations and best wishes Brookfield and BMW!

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