

Real Estate Law: Coronavirus triggers rent abatement negotiations in commercial leasing

BY KRISTIN ZIMAR

Several weeks into the nationwide shutdown resulting from governmental regulations enacted in response to the coronavirus pandemic, commercial leasing continues to suffer the consequences. Commercial tenants anticipated the financial impact of having to close their doors for a still-unknown period of time, prompting many to request relief from landlords in the form of rent abatement or suspension. Landlords are unsure what relief, if any, is appropriate under the circumstances. There are several issues that both landlords and tenants should consider in connection with negotiating and structuring a mutually agreeable arrangement.

On March 20, Gov. Andrew Cuomo, like many other governors across the country, ordered a moratorium on evictions for 90 days, meaning no tenants can be evicted nor any new eviction petitions filed until at least June 20. It is important to understand that despite this suspension of eviction proceedings, tenants will still be in default for failure to pay rent or otherwise comply with the terms of their lease which could trigger acceleration of rent, late fees, interest, and other penalties, on top of an eviction once the moratorium is lifted this summer. Legislation has been suggested that would suspend residential tenants' obligations to pay rent, but no similar relief has been proposed for commercial tenants.

For some tenants, financial support from the government may be available in the form of a Paycheck Protection Program loan or Economic Injury Disaster Loan pursuant to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). Landlords should consider ways to encourage tenants to apply for such relief which can be used to pay rent, among other business expenses.



Kristin Zimar

If the parties decide to negotiate an amendment to a lease to provide a tenant with temporary relief, there are many considerations to keep in mind. Typically, tenants will be focused on suspending or abating rent for a period of time, to be repaid over an extended period of time after the abatement period. Given the uncertainty surrounding when governmental authorities will lift existing restrictions and what their businesses might look like when they are back up and running, tenants may seek long-term suspension and abatement, but landlords should consider limiting the length of any such relief to avoid suspending or abating rent longer than is necessary and missing out on rent during months when the tenant is reopened for business. The parties should also consider whether to suspend or abate all financial obligations or just base rent where a tenant is required to contribute to common area maintenance, taxes, utility expenses, and the like.

Landlords can consider creative ways to add beneficial terms to a rent abatement or suspension amendment in the form of an extension of the term, rent increases once payments resume, interest on the abated rental payments, or payment of landlord's attorneys' fees in connection with preparing and negotiating the amendment. If a tenant has given a landlord a security deposit, the landlord may want to consider whether it will utilize those funds in the event the tenant fails to make a rent payment either

before or after entering into an amendment. Landlords may also consider requiring that the tenant provide an estoppel confirming the landlord is in compliance with the lease, requiring the tenant to provide copies of financial reports and requiring confirmation of any existing guaranty. Further, landlords should preserve their rights under the lease including any remedies set forth therein for non-payment in the event that a tenant fails to comply with the modified terms of the lease.

Both parties should consider what consents may be required for any amendment to a lease. If there is financing in place, the lender's consent may be required under the loan documents. This is not only a landlord issue. In fact, if the tenant signed a subordination, non-disturbance and attornment agreement in connection with the financing, the tenant likely agreed to obtain the lender's consent for any modification or amendment. Should the parties fail to obtain required consent of a lender, they risk the lender refusing to honor the amendment terms upon foreclosure. Similarly, many tenants operating under a franchising regime may need to obtain their franchisor's consent to an amendment.

The coronavirus pandemic has left businesses from nearly every industry looking for answers. In light of the ever-changing and uncertain business landscape brought on by the outbreak, landlords and tenants should carefully review their lease agreements and related documents to determine what relief is available and appropriate under these unprecedented circumstances. Kristin F. Zimar is an associate in the Real Estate practice at Harter Secrest & Emery LLP. She can be reached at kzimar@hslaw.com.