

Protecting Landlord Rights

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The economy is gaining ground, consumer confidence is up and market rents are increasing. Now is an opportunity for landlords to market and obtain new tenants at higher rents for more profitable centers. Some landlords may be hindered by tenant lease option(s), which may contain much lower market rents, lucrative expansion space, purchase rights and other criteria from negotiations at the inception of the lease that occurred during the Great Recession.

Common Questions:

- What exactly are a landlord's rights with a tenant's option?• Is there any way to remove a tenant who may be paying a very low market rent, other than buying them out?• If the option period is approaching, does the landlord have any obligation to alert the tenant?• If the tenant has not exercised their option on-time, what are the ramifications (i.e. will the Court let them exercise a late option)?The power of an option lies with the holder, meaning the tenant has the power to either exercise the option or not. However savvy landlord counsel, will review the lease to determine if adequate provisions limiting tenant option rights exist, which will permit the landlord to void the option prior to its exercise.• Can landlords void the option for a tenant's failure to pay all rent when due or breach of a non-payment default?• What if the default was cured?• In addition, can landlords void the option based upon a change in the original deal, such as an assignment of the lease or reduction in net worth?



If no adequate provisions to void the option are available, then the landlord and counsel should work to improve the language in any possible lease amendment, assignment and/or future leases.

Generally courts in New Jersey, Pennsylvania and New York will not rewrite contracts to make better deals for parties, unless there is a showing of fraud or other equitable reasoning. However courts in those jurisdictions have permitted tenants to exercise options when the notice to the landlord was either early or slightly late and the failure to extend would bankrupt a small "mom and pop" tenant's business.

Options Enforced According to Terms

Someone once said, "With great power, comes great responsibility." The tenant's power in the exercise of the option derives from following the terms of the lease. If an option is exercised, landlords should first look to see if the option was exercised in accordance with the lease. For instance, was it exercised within the time-frame provided in the lease? Further, was it exercised by the appropriate party? In some jurisdictions, if an attorney send the exercise notice and the lease provides the tenant is to send the same, courts will not enforce the exercise because it was not completed pursuant to the lease's specific terms. Additionally, was everyone correctly noticed as per the lease?

What Happens If The Option Is Exercised Late?

Often tenants that fail to exercise their option on-time will try and "muddy the water" by arguing that there would be no damage to the landlord in allowing a late option's exercise. For instance, a tenant grasping for straws may assert that landlord is already receiving market rent, contending that there are no damages and no real harm in allowing a late option to be exercised. Or a tenant may assert that there was a clerical error, like a calendaring mistake on their part. These types of arguments can be countered by deft counsel that understands not only the case law in your particular jurisdiction, but also the commercial real estate industry and the value of your lease.

The legal maxim has long been recognized that equity aids the vigilant, not those who sleep on their rights. Strategizing with knowledgeable legal counsel on how to limit tenant's option rights and enforce your rights as a commercial landlord when a tenant fails to exercise their option is vital to ensuring the best market rates and most profit for your real estate..

— Thomas Onder is a shareholder and member of Stark & Stark's commercial and industrial real estate group where he litigates lease option issues for commercial and industrial landlords in the tri-state area. He writes regularly on commercial real estate issues and is a member of ICSC and its NextGeneration Committee. Onder can be reached at [This e-mail address is being protected from spambots. You need JavaScript enabled to view it](#) .

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