Commercial Leases: Should New York and New Jersey Landlords Be Afraid of the Dark?

by Victor Kinon on February 24, 2012

When negotiating a commercial lease, there are often several provisions on which landlords and tenants will not agree. Because they are largely tenant friendly, “go dark” provisions generally fall into this category.

In most cases, a go dark provision allows the tenant to cease operations in its leased space. Provided the tenant continues to pay rent to landlord, it is not considered to be in default.

For tenants, the provision is advantageous because it allows the flexibility to close temporarily or close altogether without incurring the expense and potential liability of default. However, for landlords, go dark provisions mean empty retail space and possible loss of rental income.

Given the potential negative consequences, landlords with a strong bargaining position should generally refuse such provisions. However, if you are in a position where you must acquiesce to a go dark provision, we recommend implementing the following safeguards:

Recapture. A recapture clause is essential because it allows the landlord to terminate the lease should the tenant elect to go dark. In this case, neither is deemed to have defaulted on the terms of the lease, and both parties can simply walk away. In addition to discouraging a tenant from ceasing operations, a recapture clause also allows the landlord to release the space to a new tenant.

Percentage Rent. While most tenants go dark because they are not profitable, others do so for strategic reasons. To prevent landlords from losing percentage rent payments if a profitable tenant goes dark, the landlord may require the tenant to pay projected percentage rent payments or other additional compensation. In addition to ensuring uninterrupted income, this clause may also dissuade tenants from electing to go dark.

Exclusivity. Any go dark provision must also be considered in light of exclusive use provisions contained in the lease. Because exclusive lease provisions restrict the landlord’s ability to lease space to competing businesses, they should be suspended if the tenant exercises the go dark provision. Should the tenant resume its operations, landlords must generally allow for the exclusive use provision to be revived.

Notice. The go dark provision should also require the landlord to provide written notice before electing to halt its business operations. Advance notice gives the landlord time to explore its options and potentially find a replacement tenant.

Other Restrictions. Landlords can take other steps to reduce the impact of a tenant going dark. For example, landlords can negotiate a clause that permits relocation of a "dark" tenant to a less visible location or prohibits the tenant from going dark more than once during the term of the lease.

If you are negotiating a go dark clause as part of a commercial lease agreement, it is important to consult with an experienced business attorney to make sure your rights are protected.