

**THE LANDLORD'S LAWYER
A QUARTERLY NEWSLETTER FOR REAL ESTATE PROFESSIONALS****Contact Info:**

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Useful Web Sites:

GA Secretary of State
www.sos.state.ga.us

Facility Resources
www.facilitiesnet.com

Property resources online
www.property-link.com

www.johnwiles.com

Credit Bureaus

www.equifax.com

www.experian.com

www.tuc.com

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PARTNER'S NOTE

Dear Friends and Colleagues:

I am pleased to have this opportunity to chat with you through our Newsletter. Since I am not primarily involved in the litigation department of our law firm, I do not have the "day-to-day" contact with all of you, and I really miss that.

With the changing economy, every shopping center, office building, mall and strip center is unique with regard to space availability and general leasing issues. My primary focus within the law firm for the past twelve years has been lease negotiation, lease drafting, and dispute resolution. With regard to lease negotiation and drafting, our firm's extensive experience with the litigation of deals which have not worked out allows us to negotiate and draft leases with a practical understanding of future potential problems. We try to keep our client's leasing needs as our primary objective, and work to complete a deal which can be beneficial for both landlord and tenant.

With regard to dispute resolution, we endeavor to find creative, yet enforceable methods in which to maximize a landlord's recovery, and to protect its interests by minimizing the risks. This can often be done with amendments to lease, terminations of lease, promissory notes, consent orders, and covenants to either delay enforcement of a judgement or not to sue. The key is to remain practical as to potential recovery versus potential losses, so that the ends justify the means.

When I first started practicing law, almost twenty years ago, I represented creditors in the U.S. Bankruptcy Courts on a weekly basis. I continue to have an active role in our bankruptcy department. Due to the volume of bankruptcy filings, and the size of some of the individual cases, we have found that an aggressive representation of landlords provides positive results. Objecting to plans which do not adequately address commercial leases, objecting to an inordinate delay, and moving to have stays lifted to evict the debtor all ensure that the debtor must communicate with the landlord.

We are pleased to announce that we have recently hired Grady Moore, whose primary focus will be in the bankruptcy department.



Grady is a graduate of Vanderbilt Law School, and has extensive trial litigation experience having served as an Assistant District Attorney in Tennessee. He is a member of the Tennessee Bar as well as all Federal Courts in Tennessee. Grady will be introducing himself to many of you who have Tennessee cases or pending bankruptcy issues.

We enjoyed seeing many of you at our annual golf tournament last week. Congratulations to the winning team from O'Leary Partners comprised of Dan O'Leary, Ed O'Leary, Bill Ciccaglione and Billy Rowland. Also, congratulations to Kay Fletcher (Jamestown Management) winner of the "Women's Longest Drive", Brett Earp (Edens & Avant) winner of the "Men's Longest Drive", and Kelly Kepley (Wells Real Esatate) winner of the "Longest Putt". Also, special thanks to Jim Ezell (Retail Planning), Paul Wallace (AMC, Inc.) and Peter Pelt (IRT) for putting up with my golfing skills.

Sincerely,

Janet H. Wiles



PLANNING AHEAD TO AVOID TENANT PROBLEMS - PART III

Oral Promises Between Landlord and Tenant

Typically a landlord and tenant will negotiate terms and conditions to be included in a lease. Often, the tenant has a different recollection about what the landlord represented to the tenant or promised the tenant before the lease was signed. The landlord/tenant relationship is governed by the terms of the lease agreement and Georgia Courts have ruled that if the lease agreement contains a clause which states that *the lease contains the entire agreement of the parties, that all agreements and promises between the parties have been merged into the terms of the lease and that no representations, inducements, promises or agreements, oral or otherwise, between the parties and not embodied within the lease shall be of any force and effect* then, any oral promises or representations the tenant may feel were made by the landlord, but were not embodied as part of the lease agreement, are not enforceable. See Cristal v. Harmon, 137 Ga. App. 153, 223 S.E.2d 210 (1976). This clause, called a merger clause or “entire agreement” provision is instrumental when litigating with a tenant or former tenant.

Any agreements between the landlord and tenant should be put in writing and signed by the parties, whether it be in letter form or an amendment to the lease.

Landlords should also include in all leases a clause that states that the lease is not effective until it is signed by the landlord, so a tenant that has signed its name on the lease cannot claim that there is a lease in effect until the landlord has signed.

Condition of Premises

With a residential real property lease, typically the tenant takes the premises “as is”, that is, neither the landlord nor the tenant will make any renovations to the premises. However, with a commercial real property lease, there are often portions of the lease which discuss “landlords work” or “tenants work”, describing the renovations or upgrades that will occur before the tenant takes possession of the space. If there is construction to be done in the premises, the lease should contain provisions which address the possibility of a problem with construction that may delay in the

delivery of the premises to the tenant.

Another issue concerning the condition of the premises revolves around the tenant who continually renews its lease over the course of many years and remains in the same premises, by executing a new lease at the expiration of each term, rather than extending the original lease which contains an extension clause. If each lease contains language that requires the tenant to return the premises in the same condition as when first leased or “in as good order and repair as when first received,” the tenant is only required to return the premises to the condition in which they were received at the commencement of the most recent lease agreement which contained such a clause.

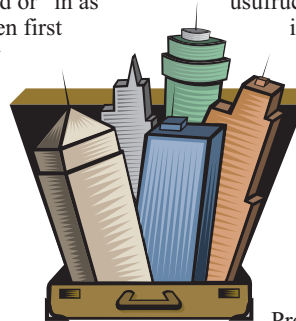
Summerville v. Belk-Rhodes Company, 160 Ga. App. 162, 286 S.E.2d 487

(1981). The theory is that “an existing contract is superseded and discharged whenever the parties subsequently enter upon a valid and inconsistent agreement completely covering the subject-matter embraced by the original contract.” Summerville, 160 Ga. App. At 163, 286 S.E.2d at 499, citing Hewlett v. Almand, 25 Ga. App. 346(1), 103 S.E. 173 (1920). In other words, if a tenant began occupying a space in 1975 under a lease for a 5 year term, and executed a new lease in 1980, 1985, 1990 and 1995, each lease containing the provision that the tenant return the premises to the landlord in as good order and repair as when first received, in the year 2000 when the landlord and tenant do not enter into another lease for the space, the tenant is required to return the premises to the landlord in the condition they were leased in 1995, despite any specialized buildout which may have occurred since 1975. The landlord that is looking for a tenant to return a space in the same “vanilla box” condition in which it was received may be in for a surprise. If the landlord wants the premises returned to the condition as first leased, each new lease must reference that requirement.

Assignment and Subletting

Though most have the best of intentions when entering into a lease that they will fulfill the lease requirements throughout the term, the reality is that businesses fail and people

underestimate their ability to make monthly rent payments. It is common for the commercial tenant to sell the business to another person or entity, in which event the new person or entity assumes the responsibilities of the tenant. Most good form leases will provide that the tenant shall not assign or sublease the leased premises without the consent of the landlord, which consent must not be reasonably withheld. Arguably, if the tenant has a



usufruct, (only a possessory interest in the real property), which by definition is not assignable, the landlord has the right to arbitrarily deny any assignment. However, courts are not favorable of this position, and a reasonableness standard is more likely to be enforced. See Stern's Gallery of Gifts, Inc. V. Corporate Property Investors, Inc., 176 Ga. App. 586, 337 S.E.2d 29 (1985).

The assignment language should specifically require that the tenant submit the assignment or sublease request to the landlord in writing, and include financial information about the proposed assignee or sublessee, whether it be a tenant information form that the landlord provides or other proof of financial stability. In a commercial setting, the landlord may require that the sublessee or assignee continue with the same use of the leased premises, so as not to interfere with tenant mix or exclusives granted to neighboring tenants.

A landlord may also require that the tenant pay a fee to the landlord in the event of an assignment, and this provision and the amount of the “processing fee” for approval of assignment should also be clearly stated in the assignment provision of the lease. Since the landlord will first have to approve an assignee and then complete the assignment process, the provision may provide that a specified fee is due by the tenant in the event that the tenant submits a proposal for assignment, and in the event that the landlord approves the assignment, and additional fee is required before the landlord will provide assignment documents to the parties. {cont. - “Tenants Problems, pg. 3}

Coming in the next newsletter:
Drafting Considerations: Default & Remedies

LANDLORD'S REMEDIES WHEN THE TENANT FILES BANKRUPTCY - PART 2

Landlord Recourse Under 11 U.S.C. Section 365; Assumption and Rejection

This provision of the Bankruptcy Code specifically concerns executory contracts and unexpired leases. The Bankruptcy Code does not provide a definition of an executory contract, and courts undertake a determination on a case by case basis, but the legislative history indicates that an executory contract generally includes contracts in which performance remains due to some extent on both sides, so that contracts are not considered executory where there has been complete performance on one side of the contract. 2 Bankruptcy Desk Guide, pt.5, ch. 20 at 13 (1990).

There generally being little question of what constitutes a lease, the provision of this section of the Bankruptcy Code most important to landlords is 11 U.S.C. section 365(d), which provides a "timetable" for the assumption or rejection of a lease. The Bankruptcy Code makes a distinction between leases for residential real property and non-residential real property as follows: In the case of a residential real property lease, in a case under Chapter 7 the lease must be assumed or rejected within 60 days of the bankruptcy filing, and in a case under Chapter 11 or 13 the lease can be assumed or rejected at any time before the confirmation of a plan of reorganization. In the case of a non-residential real property lease, regardless of the bankruptcy Chapter, a lease **must** be assumed or rejected within 60 days of the bankruptcy filing. Of course, the Bankruptcy Code provides that this time period may be extended by the court, for cause, which essentially means that the Debtor must make an application to the Court within the 60 day period requesting an extension and citing a compelling reason. Regardless of an extension of time granted by the Court, the landlord always has the right to file a motion pursuant to Bankruptcy Rules 6006 and 9014 which requests the Bankruptcy Court to compel the Debtor to assume or reject its lease. Often, the court will grant a large corporate Debtor an extension of the time to assume or reject leases because there are hundreds of leases to be dealt with in the Bankruptcy, and it may take the Debtor some time to assess its leases all over the country. However, Courts will take into consideration that a landlord does not want to wait until plan confirmation, which may be a year or more after the

bankruptcy is filed, to determine if the Debtor will be rejecting its lease, and will require the Debtor to assess the single lease on an expedited basis. As a practice point, generally if the landlord objects to the extension, the Debtor will agree to quickly make a decision.

For either residential or non-residential leases, if the lease is not assumed within the 60 day period or time otherwise set by the Court, the lease is deemed rejected. Once a lease is rejected, the Debtor has no more interest in the lease or the leased premises and the Debtor must vacate the leased premises if it has not already done so. If the Debtor fails to move out, the best course of action is to file a Motion to Lift the Automatic Stay, for the purpose of filing (or continuing the prosecution of) a dispossessory action in State Court. If the Debtor rejects the lease, the landlord has a claim for "rejection damages" pursuant to 11 U.S.C. section 502(b)(6). The damages are classified as an unsecured, nonpriority claim and are the greater of one year's worth of rent under the lease, or 15 percent of the balance due over the remaining lease term, not to exceed three years. These damages are not automatically awarded, and must be asserted in a proof of claim.

If the Debtor wishes to assume a lease, the Debtor makes a request to the Court, in the form of a Motion, requesting approval. In its motion, the Debtor must set forth that it will cure all arrearages or give "adequate assurance" that the Debtor will cure the default, and continue to perform in the future. 11 U.S.C. section 365(b).

A landlord may object to the Debtor's motion to assume its lease, in the form of a written objection filed with the Clerk of the Bankruptcy Court and served on the Debtor, debtor's counsel and trustee, in the event that the landlord disagrees with the Debtor's plan to cure the default, or feels that the Debtor has not provided adequate assurance that the default will be cured or that the Debtor will perform in the future. Often, the Debtor will want to assume the lease and then assign the lease to another party, and the landlord has grounds to object to the assumption and assignment if the financials of the proposed assignee are questionable (or not provided for the landlord's review), or, in the case of a commercial retail lease, if the proposed assignee's

business will violate an exclusive in the Shopping Center or if the landlord is concerned about tenant mix in the Shopping Center.

Importantly, if a landlord is relatively certain that the tenant is about to file bankruptcy, the best course of action is to terminate the lease. Though a landlord is giving up its right to rejection damages, if the lease has been terminated there is nothing for the Debtor to assume or reject, the Debtor no longer has the right to occupy the leased premises and the landlord should be able to recover the leased premises sooner than if the landlord had to wait for assumption or rejection. See, In Re D'Lites of America, Inc., 66 BR 558 (BC ND Ga 1986).

Coming in the next newsletter:

Asserting the Landlord's Claim for Past Due Rent

Tenant Problems

cont. from pg. 2

Additionally, all assignment or sublease clauses in a lease should state that the tenant remains liable under the lease, in addition to the liability of the assignee or sublessee. Thus, if the assignee defaults under the lease, the landlord is able to pursue the assignor (the original tenant), including the ability to name the original tenant in a lawsuit. Further, if the lease has been guaranteed by an individual or entity, the assignment documents should include specific language providing that the guarantor(s) will remain liable and ratify the terms of the assignment. In this event, the assignment documents should provide for the guarantor's signature as well as the signatures of the assignee, assignor and landlord.



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WILES & WILES Annual Golf Tournament

John Wiles presents the winners with their trophies.



(Tournament Winner not pictured: Dan O'Leary)



Marietta Country Club - October 9, 2001