

TENANT'S ACCEPTANCE OF LEASED PREMISES: MAY THE TENANT ALWAYS BEWARE

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This quarter we address some of the ramifications of the clause providing for tenant's acceptance of leased premises. We identify pitfalls to consider, and offer thoughts for avoiding those pitfalls or minimizing risks for our clients.

The typical clause looks like this:

TENANT'S ACCEPTANCE OF LEASED PREMISES

By taking possession of the Premises, Tenant accepts the Premises and waives any and all claims of defect in the Premises except for the completion of the Landlord's improvements and repairs as described in Exhibit ___ ("Landlord's Improvements"). Tenant hereby acknowledges that neither Landlord nor any of Landlord's agents has made any express or implied warranty or representation; and Tenant has not relied on any express or implied warranty or representation of Landlord, (except as may be described in Exhibit C), concerning the condition of the Premises or any fixtures or improvements located therein, or the fitness thereof for any purpose except as limited by the preceding sentence. All other express and implied warranties concerning condition are hereby disclaimed. Notwithstanding anything to the contrary herein, Landlord shall repair all latent defects within thirty

(30) days from the date that Tenant notifies Landlord of any such latent defect.

Issues/Items Raised:

1. Occupying The Property When Time is Short: We have all experienced the challenges in representing the last-minute tenant. For reasons within and outside of their control, this tenant will agree to lease a property, sign a hastily compiled work letter, or agree to tenant improvements (TIs) in very short order, and once those TIs are completed quickly, take occupancy. Given such time constraints, the competent tenant rep should encourage his or her client to engage a project manager or similar expert to oversee or inspect the landlord's work to ensure no cutting of corners and that work quality is more than just adequate for the tenant's use.

2. Protecting the Tenant from Landlord's Failure to Complete Timely TIs: Methods exist to give the tenant some cover and obligate the landlord and/or his/her contractors to complete TIs in a timely and workmanlike manner. First, the tenant may delay execution of the Commencement Letter, often required by a landlord to formally commence the lease term, if the TIs aren't properly completed. But refusal to execute the letter and commence

the lease term likely delays the tenant's scheduled occupancy of the premises and should be employed sparingly. Alternatively, including protective language in the lease for the tenant, such as rent offset (e.g. two days rent for each day of delay past the agreed delivery date); or even adding tenant's right to terminate the lease in the event of longer landlord delays or landlord's failure to meet completion deadlines altogether, are usually more effective. The point here is that you should never assume that the leased premises will be built out in a timely and complete manner, and plan accordingly.

3. Acceptance of Subleased Premises: With industrial (and to a lesser extent, office) vacancies reaching all-time lows, tenants are subleasing spaces with greater frequency and then occupying the space beyond the sublease term. In such situations, subtenants may have more limited opportunities to confirm the premises conditions before taking occupancy. At a minimum, the sublease should include terms to give the subtenant recourse to assess potential future issues (e.g., failing warehouse ceiling heaters, in one client's case) and ensure the landlord (not just the sublandlord) is on the hook to remediate such problems.

4. The Wonder of Punch Lists: Effective Documentation of conditions, with photos, videos, and third-party expert's inspection reports are useful tools. A picture is worth a thousand words.

Alerting your tenant client to tools and protections available will often protect or limit his/her exposure to unexpected conditions upon occupancy of the leased or subleased premises.

Taking occupancy subject to a punch list might be one solution, but only if terms are clear. A tenant should not accept possession, even with a punch list, if the condition of the premises is not sufficient to meet a well-defined standard, such as "to allow tenant to occupy and use the premises with no material limitations to, or interference with, Tenant's quiet enjoyment of the premises." Set forth a period for completion that is reasonable, but with a deadline, and financial consequences if the deadline is not met.

5. Judge Not, Lest Ye be Judged: An ascertainable standard for completion is important. That standard might include an unconditional certificate of occupancy if the municipality issues them. Check first. Another standard might be the opinion of an architect; but if a tenant agrees to completion in the judgment of landlords' architect, as opposed to both landlord's and tenant's architects, then one might learn an expensive lesson. Where do you think the Landlord's loyalty might lie?

To be sure the deal isn't really done until all promised work is completed, and the tenant is satisfied with the quality of the work. ♥



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