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Legal issues concerning leases vs. licenses, pop-up shops and other short-term use arrangements - by Michael Kayam

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In recent years, retail pop-up shops have become a growing trend among property owners looking to increase cash flow or traffic to their properties, as well as, businesses looking to reach new markets or test a new product while limiting their potential long-term lease obligations. This trend started gaining popularity during the depression of 2009 when property owners experiencing high vacancy rates needed to fill spaces and find new sources of cash flow, and has continued due to the increased competition e-commerce has placed on brick and mortar stores.

Because pop-up shops and other short-term use arrangements such as shared office space (e.g. WeWork) seem to be a lasting trend, property owners interested in short-term use arrangements must understand the differences between a lease and a license, and how a license provides a property owner with better protection in the event it needs to remove a business from its space in an expedited manner as explained below.

The fundamental difference between a lease and a license is that a lease provides the tenant with exclusive and irrevocable possession of the space, while a license merely grants the licensee the non-exclusive privilege to use the space which is revocable at will. As a result, while a lease grants the tenant a property interest in the space and creates a landlord-tenant relationship, a properly drafted license will not create a landlord-tenant relationship and the licensor (landlord) can circumvent the expensive and time-consuming process of a summary eviction proceeding by using self-help in the event the licensor needs to remove a licensee from its space.

Property owners interested in licensing space must be aware of the factors which would make an agreement be considered a license instead of a lease. Simply naming an agreement a license does not make it so, and a poorly drafted license can have the potential of being interpreted to be a lease.

The main legal analysis and considerations of whether an agreement is considered a lease or a license depends on the access and exclusive control language in the agreement. A good indicator of a license is a provision which states that:

“The license granted under this license is and shall at all times be a non-exclusive, revocable license which can be terminated at will by licensor, and shall not be deemed to create any tenancy interest in favor of licensee with respect to the space or the related services provided under the license.”

As you can see, it is critical that the property owner maintain control over the space, so security measures such as electronic keyfobs and other electronic access methods that can be controlled and turned off unilaterally by the property owner are a strong indicator of a license arrangement. In addition, property owners (licensors) should try to provide all services and furniture for the space with an express provision within the license agreement stating that the services and furniture are the property of the licensor and not the licensee's property.

For example, in a 2002 lawsuit regarding a dispute over whether an agreement was a lease or a license, the court ruled against the property owner and determined it unlawfully evicted the occupant of the space who was a tenant and not a licensee. See, Nextel of New York, Inc. v. Time Mgmt. Corp., 297 A.D.2d 282, 746 N.Y.S.2d 169 (2002).

In the Nextel case, Nextel entered into an agreement labeled as a license with the property owner to install rooftop cellular antennas and to occupy 200 s/f of interior space in the building. When the property owner tried to terminate the license and remove Nextel from the space using self-help, Nextel filed a Yellowstone injunction for wrongful eviction. The court agreed with Nextel and found the agreement to be a lease (and not a license), and the self-help eviction to be unlawful. In reaching its decision, the court looked to the parties agreement which stated that Nextel was to partition off an existing room in the building and install a door in order to create a space for its radio and electrical equipment, Nextel would retain title to the equipment it installed in the newly created space, and Nextel's employees had exclusive use and unfettered access to the space and found that these provisions were "typical of a lease and conferring rights well beyond those of a license or holder of a mere temporary privilege."

As illustrated by the Nextel case, no matter what you name the agreement and no matter how temporary the nature of the pop-up shop or other short-term occupancy arrangement may seem, there are specific terms that must be included and excluded if a property owner wants to take advantage of the benefits conferred by a license such as self-help evictions, and an attorney familiar with license agreements should draft or review the license ahead of time to avoid potential pitfalls.

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