



Navigating the problems and pitfalls in today's landlord enhanced good guy guaranty

January 14, 2013 - Design / Build

The good guy guaranty, a form of limited guaranty and staple of many commercial office leases, is undergoing a transformation today as the market improves and landlords seek the opportunity to gain an edge.

In its early use, this limited guaranty typically forced a defaulting tenant to be a "good guy" and promptly turn over the premises it occupied to the landlord. It did this by compelling the tenant's guarantor to pay rent from the time a tenant went into default until the date the tenant surrendered the leased space to the landlord. In exchange, the landlord benefited by avoiding months spent to evict a tenant who continued to operate with no ability or intention to continue to pay rent.

Today's "good guy guaranty" is more comprehensive and potentially exposes guarantors to significant liability over the duration of a lease. Here are some major pitfalls to watch out for and possible solutions to make them as least onerous as possible.

Subleases and Assignments

If the tenant subleases the premises, a guarantor is now responsible for both the subtenant's and tenant's occupancy. Exposure can be reduced in this case by requiring a subtenant to pay a higher than usual security deposit to the tenant. Another solution is for the tenant to accept a "good guy guaranty" from a principal of the subtenant.

If the tenant assigns the lease, a guarantor has no control over the assignee in occupancy. The tenant must make provision for this possibility in the lease or guaranty or resolve these issues at the time of the assignment. For example, as part of the landlord's approval, the tenant could negotiate a termination of the guaranty with a principal of the assignee substituted as guarantor.

Accrued Rent Such as Real Estate Taxes and Operating Expenses

"Good guy guaranties" have been expanded to guarantee all rent due or accrued from the execution of the lease until the tenant vacates to cover unpaid amounts prior to the declaration of default. Another embellishment is to add back the tenant's rent concession or abatement, brokerage commissions and construction costs, making all of them due and payable prior to the date the tenant surrenders the space. Amortizing these extras over the term of the lease is a minimum step in keeping the guaranteed amount at a reasonable level. Some guaranties state the surrender of the lease ends the guaranty only if the tenant is current in its rent so there are instances when a landlord says "gotcha" if some additional rent such as real estate taxes or operating expenses is unpaid even though the guarantor is liable for such rent. If not paid because not known, the guarantor may be obligated to pay another month's rent.

Compliance with Law,
Repairs, Maintenance and
Other Obligations

Some guaranties provide that the individual is guarantying rent, but others guaranty all tenant obligations, such as compliance with law, repairs and maintenance. A careful reading of the lease is necessary to determine the obligations of the tenant.

Giving Notice Before

Surrender of Premises

Many landlords now provide that the surrender of the premises must be by a written surrender agreement accompanied by the keys and actual possession. Some have gone even further and provided that the tenant must also give several months' prior written notice. Most individuals will find this an unacceptable burden, but many may agree to a one or two month notice provision.

Tenant Bankruptcy

Some "good guy guaranties" provide that the guarantor is liable in the event of the tenant's bankruptcy from the time of the bankruptcy until the surrender. Under the Bankruptcy Code, the rejection of the lease and surrender of the space may take up to ninety days, which would be covered by this guaranty. Also, if the tenant pays the landlord past due rent, that money may be considered a preferential payment to a creditor requiring the money to be paid to the bankruptcy trustee. The guaranty makes the good guy guarantor again liable for those preferential payments.

Relationship Between

Tenant and Guarantor

The surrender of the premises may release a guarantor, but will not release the tenant of its obligations for the balance of the lease term. The guarantor is usually required to subordinate seeking reimbursement from the tenant until the landlord has been paid in full. Guarantors, who are not the sole owners of the tenant, should obtain an agreement from the co-owners whereby each agrees to reimburse your guaranty obligations to the extent of their respective percentage interests in the tenant.

If a landlord does not offer a simple "good guy guaranty" then reaching a fair guaranty will be a matter of negotiation. The tenant should discuss the proposed "good guy guaranty" with an experienced broker and lawyer as soon as it appears as part of the lease terms and possibly be prepared to negotiate long and hard.

Gerald Morganstern Esq. is a managing partner at Hofheimer Gartlir & Gross, LLP, New York, N.Y.

New York Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540