



When a landlord/tenant relationship goes awry: The simple art of the default notice

November 24, 2014 - Spotlights

It's great when the real estate market is strong and developers are making solid deals with triple- A credit tenants. But what happens when a relationship between a landlord and a tenant in the commercial setting goes awry? Bad things do happen, even in the best of business relationships, whether because of a general economic downturn, a tenant facing the pressure of increased competition or a tenant who turns out to be less reliable than originally thought.

In such cases, the devil is in the details, and those details are in the lease itself. When it comes time to enforce the provisions of the lease because of a default, attention to those details become critical. An important tool at the disposal of the commercial landlord with a defaulting tenant is the threat of a holdover proceeding, which has as its ultimate goal regaining possession of the premises. Even the threat of such a proceeding may force an otherwise recalcitrant tenant to negotiate over a disputed obligation in the lease. But in order to bring a holdover action, a landlord must first serve an effective default notice.

Whenever a landlord seeks to terminate a lease for violation of a substantial lease obligation, he must first serve a written notice of default. Only service of a "proper" notice will act as a condition precedent to terminating a tenancy, and a deficiency in a notice will deprive the landlord of an appropriate predicate for terminating the lease and bringing an action to reclaim possession.

For example, suppose your tenant is in default for failure to pay rent. Your attorney prepares a detailed notice of default that is otherwise in compliance with the lease and any applicable statutes, but the notice is sent out over the attorney's signature instead of yours. In such a case, unless the attorney had been specifically named in the lease as an agent for purposes of serving notices on your behalf, the likelihood is that the notice will be deemed insufficient. Even a statement in the notice itself that the attorney has such authority will probably be deemed insufficient. Accordingly, best practice would dictate that the party who signed the lease should also sign the notice of default, even if the notice is drafted by counsel.

No landlord wants to go through the process of commencing a holdover proceeding with the attendant costs and delays, only to find out that the notice that served as a predicate for bringing the proceeding in the first place was deficient. It is, therefore, critical that attention be given to the very straightforward, but often strictly construed, rules regarding such notices.

Requirements for serving
an effective default notice

In general, an effective default notice should: (1) identify the act or omission that supports the claimed default; (2) identify the lease provision(s) or statutory ground(s) that it is claimed the tenant violated; (3) direct the tenant to cure the default within a certain period of time; (4) describe the manner in which the cure may be effected; and (5) identify the consequences (e.g. termination) of

the tenant's failure to cure in a timely manner.

While the New York courts have often said that the appropriate test for determining the sufficiency of a predicate notice in summary holdover proceedings should be "reasonableness" under the circumstances, it is better to adhere to the technical provisions of the lease to create the best opportunity that such a notice will be deemed adequate by the court. Experience dictates that there are judges who will look for any opportunity, and often on technical grounds, to prevent forfeiture of possession.

At the very least, when a default notice is prepared, care should be taken to review provisions of the applicable lease regarding the substantive obligation claimed to have been violated, the process for determining whether a default has occurred and the proper method of giving notice under the lease. If, for instance, the lease provides that the landlord is required to send a duplicate copy of any default notice to the premises, a failure to do so may render the notice ineffective and require the landlord to start the process anew. And if the lease requires, for instance, that any notices should be sent "United States Certified Mail Return Receipt Requested," then a notice sent by any substitute means could be deemed deficient by the court.

Anyone preparing a notice should take care to review the lease for any additional technical requirements, such as, for instance, a requirement that a copy of any notice be sent to the tenant's attorney. Care should also be taken to identify the specific section of the lease that the landlord is claiming tenant violated, and to giving notice to the tenant that, unless the default is cured, landlord will terminate the lease, again citing the specific provision of the lease pursuant to which such termination will be sought.

Even assuming that the draft default notice is effective in all respects noted above and served properly in the manner required by the applicable lease, the landlord will still have to serve a written "termination notice" prior to being able to commence a holdover proceeding.

Under New York law, all termination notices should be "timely, definite and unequivocal," making specific reference to the default notice previously served (attaching a copy is recommended) and stating specifically when the lease will be terminate (which, if no time is specified in the lease, should be a "reasonable" time).

Assuming these technical requirements have been complied with, both as to the "default notice" and the "termination notice," the landlord should be able to commence a holdover proceeding to regain possession of the premises. That is, if tenant has not first obtained a timely "Yellowstone Injunction," a subject for future consideration.

Bernard Kennedy is a co-managing member of Bond, Schoeneck & King, Garden City, N.Y.

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