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Seven Ways to Save On Your Commercial Landlord Tenant Lawyer - By Howard Koh

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Almost nothing bothers property owners more than having to hire a landlord-tenant litigator. It means that the landlord-tenant relationship has soured. Perhaps the tenant is not paying rent or using the premises in the way the landlord expected. Perhaps the landlord wants to reposition the property and the tenant will not cooperate.

Usually, the problems result from a change in one of the parties' expectations. Maybe the tenant's business is not generating the cash flow that the tenant expected. Maybe, something in the build-out did not go as planned. Or the market has changed and the property is no longer being used in the highest and best way. Ultimately it does not matter, the owner now must spend money to fix a problem.

How can the owner minimize its expenses when its relationship with its commercial tenant goes south? Here are seven ways.

First, address the problem in the lease drafting. Surely this has occurred to most owners, but it bears repeating. The best way to resolve a landlord tenant dispute is by ensuring that you have a good lease. What is a good lease? A good lease is a lease that encourages good tenant behavior and discourages bad tenant behavior. Thus, leases should have clear consequences for tenant breaches. Carefully spelled-out consequences for late payments are a basic but be sure that the consequences are legally enforceable.

More advanced lease drafting would involve clearly setting forth how additional rent, such as real-estate taxes or operating expenses are computed and how the amounts due are communicated to tenants. Few things can be worse for a commercial landlord-tenant relationship than hitting a tenant with a significant, surprise additional rent change. Should the tenant have anticipated the obligation to pay additional rent? Perhaps, but including better communication systems in a lease can ensure the tenant receives adequate notice of variable charges such as tax escalations. Better communication makes it less likely that a tenant will be surprised by unexpected charges.

Also, clear, legally enforceable liquidated damages clauses will help ensure that tenants are not tempted to breach the lease for economic gains. But be sure that your liquated damages clauses to not overreach. If they do, a judge will rule that the clause is an unenforceable penalty.

Second, keep meticulous records. Almost nothing can damage a case more than having to rely upon records that the trier of fact cannot understand. In virtually all cases, the trier of fact is a landlord-tenant judge because the lease contains a jury waiver clause. But judges are busy people. They do not want to spend any time listening to an explanation about how the records show what you are claiming. As a litigant you want your judge to look at your records and instantly comprehend what is going on. That means records and notices to tenants should be mistake free. If you say the tenant owes you a specific amount, do not change the amount of the claim in the litigation. If you change the amount of a claim, your lawyer must spend time explaining the change and in litigation, lawyer time is an increased cost. But of course, it gets worse. If you give a tenant the chance to

question your accounting, the tenant will drag you into a fight over the accuracy of the numbers. If your numbers are confusing, you risk a judge deciding that you are not really owed anything, because you cannot easily prove what you say is owed. Do not be this litigant.

Third, communicate clearly and often. As in most human relationships. Things tend to go better when the parties discuss issues honestly with each other. If you need access to make repairs, let the tenant know early so that the tenant can minimize disruption to its business. After all, the business provides the cash to pay the tenant's rent. If a tenant makes a request for a repair and you cannot make that repair or it is not the owner's responsibility to do so, let the tenant know. Document your communications in writing so that tenant cannot later claim that it did not know your position. Even if your prompt, clear communication does not resolve the problem, you have created a record and set yourself up as the reasonable party in the eyes of the judge. That always helps save money on lawyers.

Fourth, follow the advice of the professionals. The reason to hire experts is they are, well, expert. If an expert, such as an architect or engineer tells a property owner to replace a piece of equipment and you do, you have a start of a good defense that goes, "I hired a professional and did what I was supposed to do." By contrast if you hire a professional and then ignore the professional's advice you have given tenant's counsel a golden opportunity to second-guess you. Why would you do that? If you are going to bring in outside experts, listen to them. You don't what to be the litigant that has to explain to a judge why you didn't hire a mold remediation company when an expert recommended you hire one.

Fifth, implement standard policies, procedures, and systems. When tenant issues are addressed in a uniform manner, two benefits result. First, using standard operating procedures functions like a check list and ensures that critical steps are not missed. Second, a property owner has a defense against any charge that the tenant is receiving disparate treatment. An allegation that a tenant has not been treated the same as other tenants can often be overcome, but it is an additional obstacle and that raises legal costs. Avoid giving tenants the chance to create such an obstacle.

Sixth, train your team. Most property owners are not a one-man band. They have a staff that monitors the accounts, schedules the contractors, computes the additional rents, and runs the operations of the business. The staff constitutes the owner's front line of operations and it must be trained to respond appropriately when issues arise. It is not enough for the owner to avoid making the mistakes described in this article, the owner's team must be at least as good because a chain is only as strong as its weakest link.

Seventh, be reasonable, but not a doormat. When you are negotiating to resolve disputes, you want to create opportunities for your tenants to succeed. Do not lock them into obligations that they cannot meet that will only delay the dispute. When the tenant inevitably fails to meet your unreasonable goals, the problem will only have grown, meaning that the damages will have increased.

On the other hand, you cannot be a doormat. Tenants need to be trained to treat their landlords with

respect. If you continue to allow tenants to fail to perform without consequence, they will quickly learn that the obligations in the lease are merely requests that they can ignore with impunity. Later, when you try to enforce lease obligations the tenant will be confused because you let other obligations slide. Even if you have a lease clause that says the failure to enforce a lease provision cannot be construed as waiver, you will find that what started as a small issue has grown into a larger one. Thus, the key is to strike a balance between not attempting to enforce the tenant to do what is impossible and not enforcing the lease at all.

Conclusion. No one likes paying legal fees to get what they were always entitled to get. But sometimes things do not go as expected and landlord tenant disputes arise. By following these guidelines, you create your best chance to avoid disagreements turning into litigations. If litigation does ensue, these guidelines will help keep the legal costs down.

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