



## **Tenant's improvements and mechanics liens: The landlord's dilemma**

May 22, 2009 - Long Island

Owners and landlords are facing added dilemmas as a result of defaulting tenants. In many situations, tenants have caused vast improvements and engaged the services of general contractors, subcontractors, suppliers and the like to improve their space, with or without the landlord's consent. A tenant may walk away from their lease obligation via a "good guy clause," leaving the landlord to pursue a judgment against the corporate entity and shareholders who may or may not have any assets. Landlords may be off guard when they suddenly receive mechanics liens for hundreds of thousands of dollars for actual or alleged tenant improvements or equipment to which the landlord has no knowledge, and has not been privy to any contracts or any of the tenant's improvement efforts.

In many situations, a leaseholder has actually performed improvements or is a shareholder in a corporation that holds the lease and performed construction work in exchange for ownership interest in the leaseholder entity (leaseholder contractor). Creative partnerships with general contractors abound in this economy where tenants cannot afford to pay for needed build outs and "partner" with a general contractor and provide profit and ownership in exchange for construction labor and material.

Can the leaseholder contractor also file a mechanics lien or must they pursue their interest via corporate dissolution? A mechanic's lien is only valid to the extent there was a "sum due and owing." Since the leaseholder contractor has already received the ownership interest as "value," a mechanics lien should not be enforceable.

### **General Contractor's Remedies**

A general contractor, subcontractor or any supplier may file a mechanic's lien for work and labor that has actually been performed and for which value has not been received. One who provides labor or material for improvement with a lessee may acquire a lien on the lessee's interest in such property. Additionally, a lien may be acquired on the lessor's interest if the lessor "consents" to the improvement. If consent is present, the amount of the lien would be the reasonable value of the work yet paid, and not the contract price, as the lessor was not a party to the contract.

### **Landlord's Remedy to a Lien placed by a Tenant's Contractor**

In a situation where a tenant's contractor files a lien, a lienor must establish that the owner of the real property is subject to a mechanic's lien because the owner either consented to or requested the plaintiff's services. The consent required is not mere acquiescence and benefit, but some affirmative act or course of conduct establishing confirmation. There must be a showing of some affirmative act on the part of the owner/landlord which can be construed as the consent required by Lien Law Sec. 3. Even where an owner/landlord knows that work is being performed as they readily visit the premises, where the landlord does not have any direct contract with those engaged in the actual

work being performed, and the landlord's consent for the proposed alterations has not been obtained, a lien cannot lie.

The courts have held that to sustain a lien, the owner must either be an affirmative factor in procuring the improvement to be made, or having possession and control of the premises, assent to the improvement and the expectation that they will reap the benefit.

Leases should indicate that if a landlord does provide consent to the tenant's improvement, such consent is provided solely as an accommodation to the tenant under the lease, shall not create any lien right on behalf of any individuals or corporations that perform said improvements or alterations, as the landlord does not expect, anticipate and specifically rejects that the tenant's improvement has any value to the landlord.

Further, while New York does not recognize a pre-signed lien waiver, it would be beneficial to have any of the tenant's contractors sign a lien waiver after work is completed and to sign a form also containing the above referenced clause. Having an additional protective clause in the lease and an affirmative document signed by the contractor, while it will not guaranty the dismissal of a lien, will go a long way in convincing a court to dismiss a lien outright, rather than allowing the matter to proceed through lengthy discovery.

Lawrence Kushnick, Esq. is a member of Kushnick & Associates, P.C., Melville, N.Y.

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