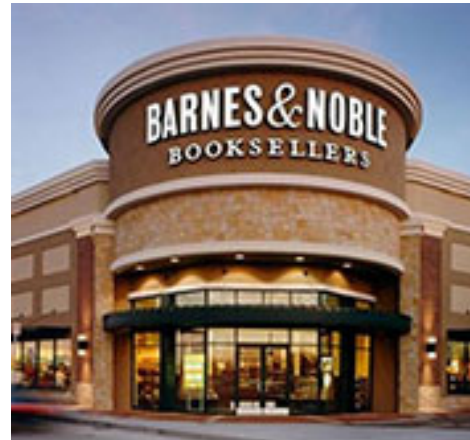


Retail Leasing Update

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October 23, 2018



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About Me

- Special Counsel at Bouvier Law LLP
- BA, Canisius College; JD, Notre Dame Law School
- Former Real Estate Associate at Phillips Lytle LLP and Lippes Mathias Wexler Friedman LLP
- Extensive experience in commercial real estate, including:
 - Leasing
 - Sales and Acquisitions
 - Project Development
 - Financing
 - Real Property Title Matters
- Member of NYSCAR and ICSC



Status of Retail Real Estate

Hot Button Issues

Hot Button Issues



Percentage Rent and Gross Sales



Lease Exit Strategies



Permitted Use and Tenant Exclusives



Restrictive Covenants

Percentage Rent and Gross Sales

Percentage Rent is a form of rent paid in addition to, or in lieu of, Base Rent.

It is almost exclusively reserved for retail tenants and is based upon a percentage of the tenant's gross sales, typically over a breakpoint.

- $\text{Natural Breakpoint} = \text{Base Rent} / \text{Percentage}$

Potential Lease Issue:

- How do online sales completed in-store impact computation of Gross Sales?



Lease Exit Strategies

Tenant:

- Co-Tenancy Clauses
- Kick-Out Clauses
- Assignment and Subletting Clauses

Landlord:

- Continuous Operation Clauses
- Assignment and Subletting Clauses

Permitted Use and Tenant Exclusives

Used by Landlords and Tenants to control the behavior of the other party after the Lease has been signed.

- **Permitted Use Clause** – Defines which activities/uses a Tenant can perform in the Leased Premises.
 - Important Wording:
 - “...and any uses ancillary thereto...”
 - “...and for no other use without Landlord’s prior written consent...”
- **Tenant Exclusive Clause** – Prohibits a Landlord from leasing any other space in a particular Shopping Center to another tenant for the same use as the subject Tenant.



Restrictive Covenants

Restrictive Covenant – A covenant or deed restriction that limits the property rights of the owner or landlord.

Potential Lease Issues:

- RCs in existing leases preventing Landlord from leasing vacant space to a potential tenant.
- RCs of record limiting the types of tenants Landlords can lease to within a Shopping Center.

Bankruptcy



Bankruptcy

17. Bankruptcy of Tenant.

It shall be a default by Tenant under this Lease if Tenant makes an assignment for the benefit of creditors, or files a voluntary petition under any state or federal bankruptcy or insolvency law, or an involuntary petition alleging an act of bankruptcy or insolvency is filed against Tenant under any state or federal bankruptcy or insolvency law that is not dismissed within 90 days, or whenever a petition is filed by or against (to the extent not dismissed within 90 days) Tenant under the reorganization provisions of the United States Bankruptcy Code or under the provisions of any state or federal law of like import, or whenever a petition shall be filed by Tenant under the arrangement provisions of the United States Bankruptcy Code or similar state or federal law, or whenever a receiver of Tenant, or of, or for, the property of Tenant shall be appointed, or Tenant admits it is insolvent or is not able to pay its debts as they mature.



Bankruptcy

Process for Tenant Bankruptcy (Chapter 11)

- Upon filing for bankruptcy, all collection efforts must stop
- Landlord should file Proof of Claim
- Tenant must assume or reject Lease within 60 days (can be extended for another 60 days)
 - Lease could potentially be assigned (subject to Landlord's rights in Lease to consent)
 - If Lease is assumed, Tenant (or assignor) must cure all defaults



Questions?

THANK YOU!