CHAPTER 2

Overview of Assignment and Subleasing Issues in Commercial Leases

MICHAEL N. SAMUELS

I. INTRODUCTION

Albert Einstein once said, "Make everything as simple as possible, but not simpler." After entering into a lease, landlords and tenants often encounter numerous problems because what had once appeared to be seemingly "simple" assignment and subleasing provisions were not given enough attention during the negotiation of the lease. There are a myriad of factors for landlords and tenants to consider when drafting and negotiating their assignment and subleasing provisions. Such considerations include not only the actual provisions in the assignment and subleasing section of the lease but also the impact that other provisions in the lease may have on assignments and subleases.

When negotiating assignment and subleasing provisions, it is critical that attorneys impress upon their respective clients the many potential short-term and long-term ramifications that could result from the ultimate outcome of their negotiations. At times, in the haste of racing to finish a deal, a landlord or tenant may advise its attorney that it is willing to concede assignment and subleasing related issues to the other party because of its level of trust with the other party. Yet the reason that assignment and subleasing provisions are so important is precisely because, at any time in the future, the landlord or tenant may be forced to deal with a new party with whom it has no prior relationship; or worse, with whom it has an adversarial relationship. At that time, when the tenant submits a request to the landlord to approve its sublease or assignment, the restrictions in the assignment and subleasing provisions of its lease, which once seemed moot, now ultimately will determine whether the landlord must accept an undesirable subtenant or assignee in its building. Similarly, if the landlord sells the building the tenant may find itself dealing with an uncompromising successor landlord in

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seeking consent to its sublease or assignment, in which event it is only the assignment and subleasing protections drafted into the lease that can force the unrelenting landlord to cooperate with a potential transfer. The very nature of assignment and subleasing provisions requires landlords and tenants to plan for unforeseeable circumstances and unknown parties, regardless of the condition of the respective parties or their relationship when the lease is signed.

The recent economic downturn has caused many landlords and tenants to focus more intently on transferability issues in their lease negotiations. Some formerly blue-chip tenants, who at one time could only contemplate long-term growth and expansion options, have been forced to surrender large blocks of space due to layoffs and decreased revenue. At the same time, some tenants with less credit have been able to lease space in areas that they could not afford in prior markets; and in some instances, these lesser credit tenants have taken more space than they need because they are planning for their long-term growth. In reality, the economic fortunes of many tenants fluctuate daily. As one would expect, upon greater scrutiny the objectives of the landlord and the tenant in controlling the future of the leased premises substantially differ.

II. KEY LANDLORD CONSIDERATIONS

The following considerations are among a landlord's concerns in negotiating assignment and subleasing provisions in its lease:

- Controlling the mix of tenants in its building, particularly in a retail setting, so that all of its tenants are in a position to succeed in their respective endeavors and are not competing with one another for the same business.
- Controlling the use of the leased premises because an undesirable use could negatively affect the reputation, legal compliance, and efficiency of its building.
- Having the named tenant that executes the lease remain liable for all of its obligations throughout the lease term, including requiring that after an assignment, the assignor remain primarily, rather than secondarily, liable for the tenant's lease obligations. This ensures that the landlord would not be required to first exhaust its remedies against the assignee before pursuing any of its available remedies against the assignor. As the author once heard a very senior attorney representing a landlord explain to his much more junior counterpart during a lease negotiation, a lease is like glue in that once a party touches it, that party is stuck to the lease until the lease term ends.
- Maintaining credit tenants, so that the landlord is comfortable with the creditworthiness of the tenants in its building and their ability to continue paying rent.
- Being able to take advantage of an "up market" when space is at a premium and rents are high and being protected in a "down market" when space is aplenty and rents are low. The landlord accomplishes this objective by maintaining a right to recapture the leased premises if the tenant desires to enter into a sublease or an assignment with a third party. If the rent under the tenant's lease is

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lower than the then current market rates, the landlord may exercise its option to recapture the leased premises and subsequently relet it to a new tenant or, in the right scenario, even directly to the tenant's potential subtenant at a higher rent. Alternatively, if the tenant is paying above-market rent under its lease at the time that it wants to enter into a sublease or an assignment, then the landlord likely would not exercise its recapture right unless there were other concerns with the tenant's financial ability to continue paying rent or the potential subtenant's or assignee's character, creditworthiness, or proposed use of the leased premises.

To summarize these landlord objectives in one word, the landlord wants *control*.

III. KEY TENANT CONSIDERATIONS

On the other side of the negotiating table, the following considerations are among a tenant's concerns in negotiating assignment and subleasing provisions in its lease:

- Maintaining flexibility to share the leased premises with its affiliates, parents, subsidiaries, and entities with which the tenant has a business relationship, without having to obtain the landlord's approval in each instance. This is particularly important both to large companies in which divisions providing different services operate under separate entity names and to companies working on projects that require a collaborative process with third parties needing to work in the leased premises for several months at a time.
- Maintaining flexibility to merge, consolidate, and restructure its organization, without having the landlord and the lease act as an impediment to consummating any such transaction. A nightmare scenario would be for a tenant to successfully negotiate a deal with a merger partner, experiencing a great deal of hardship and expense in doing so, only then to discover that the impending merger potentially could be delayed or impeded by the landlord under the applicable provisions of its lease.
- Maintaining an exit strategy if the leased premises no longer satisfies its needs, either because the tenant has outgrown its premises or because the tenant has downsized its operations and needs less space. The largest expense in many companies' budgets is the rent for their space. As companies try to remain profitable in difficult economic times, they need the flexibility to be able to reduce their space and mitigate their rental obligations by entering into a sublease. However, the tenant may not want to permanently surrender any portion of its space to the landlord because its downsizing may be temporary. Some tenants may envision growing in the future, and in such an instance, a sublease would enable those tenants to regain possession of the leased premises after the term of the applicable sublease expires. Similarly, successful start-up companies can quickly outgrow their leased premises and discover that what had once been a

surplus of space now is simply too small for their required operations. If the landlord does not have more space available to lease to it in the building, the start-up company often will not want to have to lease space in an additional building, with its employees working in separate locations. As a result, start-up companies should be careful to negotiate an exit strategy in their leases to ensure that if the size of their leased premises begins to impair their success, they will be able to sublease their existing premises so that they can find new larger space to lease in another building for their entire company.

To summarize the tenant's aforementioned objectives with one word, the tenant wants *flexibility*.

IV. ASSIGNMENT AND SUBLEASE PROVISIONS AND THE COURTS

In negotiating assignment and subleasing provisions and trying to meet their client's objectives, attorneys must recognize that the impact of the provisions is not determined solely by the parties to the lease; the courts may ultimately be given the power to interpret the applicable provisions. It is important to understand the tendencies of the courts in interpreting these provisions. From the early stages of common law through today's most recent court cases, our legal system continually has disfavored restraints on the alienation of real property. In most jurisdictions, this has resulted in a well-established law that if a commercial lease does not expressly prohibit a tenant from assigning its lease or subleasing its premises to a third party, then the tenant is permitted to do so without obtaining the landlord's prior consent.[1] Similarly, if a lease prohibits assignment but is silent as to subleasing, or vice versa, the omitted transfer is considered to be permitted under the lease.[2]

When drafting assignment and subleasing provisions, landlords' attorneys should be meticulous in contemplating all potential transfers that they would like to restrict, because any transfers that are not expressly prohibited in their leases may be permitted. Courts rarely will expand transfer restrictions in commercial leases to encompass the intent of the drafter of the lease, under the assumption that if the drafter had intended to make the restrictions more inclusive, that person would have done so in the first instance.

Occasionally, an attorney will encounter a lease that, due to the small size of the space being leased or for any multitude of reasons, is relatively skeletal. The parties desire to keep the lease simple but do not realize that they are complicating matters by not drafting the scenarios that they intend to cover. For example, the operative assignment and subleasing provision may be limited to the following common provision, referred to in this article as a "simple transfer restriction

1. Butterick Publ'g Co. v. Fulton & Elm Leasing Co., 229 N.Y.S. 86 (Sup. Ct. N.Y. Cnty. 1928); Dress Shirt Sales, Inc. v. Hotel Martinique Assoc., 239 N.Y.S.2d 660 (1963); Jenkins v. Eckerd Corp., 913 So. 2d 43 (Fla. Dist. Ct. App. 2005).

2. Rogers v. Hall, 227 N.C. 363 (1947); Millinery Co. v. Little-Long Co., 197 N.C. 168 (1929).

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clause": "Tenant may not assign this Lease or sublease the Premises without Landlord's prior written consent, which consent shall not be unreasonably withheld."

Courts in the majority of U.S. jurisdictions have determined that the simple transfer restriction clause alone would not be sufficient to prohibit many methods of transferring the lease that may be implemented by the tenant. For instance, courts have held that because the simple transfer restriction clause mentions only that the tenant is prohibited from subleasing "the premises," the tenant may be permitted to sublease a portion of the premises.[3] Even though the intent of the landlord's attorney in referring to the "premises" likely was to prohibit the tenant from subleasing any portion of the premises without the landlord's prior consent, the majority of courts will not infer that intent from the simple transfer restriction clause. Instead, the majority of courts will place the burden on the landlord's attorney to draft the lease provision in a manner that expressly articulates the landlord's intention in restricting transfers of the lease. Thus, it is important for landlords' attorneys to provide that the tenant may not sublease the premises "in whole or in part" in order to negate any inference that could be created by only providing for one or the other or by only referring to "the Premises."

Courts also have held that in a scenario in which the simple transfer restriction clause is the operative provision in the lease and the landlord consents to an assignment of the lease from the tenant to a third party, by that initial consent the landlord may be waiving its right to require that the tenant obtain the landlord's consent to future assignments of the lease.[4] To protect the landlord against this potential waiver, the landlord's attorney should provide in the lease or in the landlord's consent to the particular assignment that notwithstanding any consent granted by the landlord to this assignment, the landlord's consent will continue to be required for all future assignments of the lease. If the landlord's attorney does not draft this provision, the majority of courts will not infer it.

In addition, the simple transfer restriction clause would not prohibit the tenant from (1) merging with a third party, (2) selling all of its assets to a third party, or (3) transferring all of its stock to a third party.[5] With each of these aforementioned transactions, the tenant effectively could assign the lease by transferring its assets or stock to, or merging with, a third party, leaving the landlord with a new party occupying the leased premises under the tenant's name. In some cases, the tenant may be a single-purpose entity that was created solely for the purpose of entering into the lease. In such an instance, the only purpose of transferring the stock or assets of the tenant to, or merging with, a third party would be to assign the lease without being required to obtain the landlord's consent to the transaction.

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3. Drake v. Eggleston, 108 N.E.2d 67 (Ind. App. 1952).

4. Lynch v. Joseph, 240 N.Y.S. 176 (4th Dep't 1930); Costallat v. Diamond, 234 N.Y.S. 152 (2d Dep't 1929); Fischer v. Ginzburg, 181 N.Y.S. 516 (1st Dep't 1920).

5. Rubinstein Bros. v. Ole of 34th St., Inc., 421 N.Y.S.2d 534 (Civ. Ct. 1979); Nat'l Bank of Albany Park v. S.N.H., Inc., 336 N.E.2d 115 (Ill. App. Ct. 1975); Dodier Realty & Inv. Co. v. St. Louis Nat'l Baseball Club, 238 S.W.2d 321 (Mo. 1951).

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To prohibit these evasive transactions, landlords' attorneys should draft into their leases a clause commonly referred to as a change in control provision. The change in control provision provides that if there is a change in the party controlling the tenant, then that change in the "control" of the tenant is considered to be an assignment of the lease requiring the landlord's prior consent. To account for tenants' potentially different corporate structures, the term "control" often is defined in commercial leases as

> The ownership of more than fifty percent (50%) of the outstanding voting stock of a corporation or other equity interest if not a corporation or the possession of power to direct or cause the direction of the management and policy of such corporation or other entity, whether through the ownership of voting securities, by statute or according to the provisions of a contract.

If the tenant is an individual and the lease contemplates continuation after the tenant's death, courts have determined that a simple transfer restriction clause would not prohibit the tenant's executors from assigning the lease to a third party without the landlord's consent.[6] Effective upon the tenant's death, the lease would be transferred by operation of law to the executor of the tenant's estate, who then could assign the lease to a third party without the landlord's prior consent. In order to prevent this, the lease should expressly prohibit the tenant's "heirs, distributees, and executors" from assigning the lease without the landlord's prior consent. As is the common theme in each of these instances, if a landlord's attorney wants to prohibit a transfer by the tenant or its successors under the lease, then courts require the landlord's attorney to expressly draft that prohibition in the lease.

While the danger for landlords is in having underinclusive transfer restrictions that may permit undesirable assignments and subleases by their tenants, tenants' attorneys should make certain that the transfer restrictions in the leases do not prohibit their clients' particular needs. A tenant needs to have flexibility not only to assign its lease or sublease its premises but also to operate its business unimpeded by any transfer restrictions set forth in its lease.

For example, if a lease contains a change in control provision that prohibits the tenant from transferring its stock without the landlord's prior consent and the tenant's attorney is representing a client registered on the New York Stock Exchange, the tenant's attorney should add language to the lease enabling the tenant to transfer its publicly traded stock without being required to obtain the landlord's consent.

Similarly, if a tenant's attorney representing a law firm or an accounting firm is negotiating a commercial lease that contains a change in control provision prohibiting the tenant from transferring its controlling interests without the landlord's prior consent, the tenant's attorney should add language giving the tenant the right to add and remove members of its partnership without being required to obtain the landlord's consent.

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6. Francis v. Ferguson, 246 N.Y. 516 (1927); Morris v. Canadian Four State Holdings, Ltd., 678 N.Y.S.2d 214 (4th Dep't 1998); *In re* Estate of David, 714 N.Y.S.2d 175 (N.Y. App. Div. 2000); Berman's Estate, 58 Pa. D. & C. 678 (1947).

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V. REASONABLENESS

For tenants, the power of one word can significantly improve their position when requesting the landlord's consent to a proposed assignment or sublease—"reasonable." Although it may seem insignificant to have the landlord agree in the lease to be "reasonable" in granting its consent to an assignment or sublease proposed by the tenant, the implications of not having the landlord agree to be reasonable can be crippling for a tenant. As explained earlier in this chapter, silence in a lease can hurt a landlord because if a particular type of transfer is not expressly prohibited in the lease, then in most jurisdictions it is considered to be permitted. Silence in the lease can hurt a tenant, too, if a lease is silent as to the standard for the landlord granting its required consent to a proposed assignment or sublease.

In most jurisdictions, the courts will not imply from a provision stating "Tenant may not assign this Lease or sublease the Premises without Landlord's prior consent" a duty of the landlord to act reasonably in granting or withholding its consent. Instead, the courts in a majority of jurisdictions will afford the landlord sole discretion in making its decision.[7] The ramifications of a landlord having sole discretion can be devastating to a tenant's efforts to assign its lease or sublease its premises. When afforded sole discretion, the landlord can (1) withhold its consent to a proposed assignment or sublease for any reason, (2) attempt to renegotiate the rent under the lease as a condition to granting its consent to a proposed assignment or sublease, or (3) ignore the tenant's request for consent entirely. Essentially, the tenant has no leverage with the landlord and cannot offer its proposed assignee or subtenant any comfort that it will be able to obtain the landlord's consent.

The criteria of what constitutes the landlord being "reasonable" in withholding its consent to a proposed assignment or sublease is the subject of much debate among courts in various jurisdictions and is addressed in greater detail in chapter 7 of this book. It should be noted that there are several jurisdictions in which, despite silence in the lease as to the standard for the landlord granting its consent, courts will impose a reasonable standard on the landlord in consenting to proposed assignments or subleases, but they remain the minority.[8] For a discussion regarding implied reasonableness standards in various states, see chapter 6 of this book.

If a landlord agrees in its lease to be reasonable in granting its consent to assignments and subleases proposed by its tenant, that landlord may be surprised to learn that rejecting a proposed assignment or sublease based on its prudent business judgment does not mean that it is being "reasonable" in doing so. Courts in most jurisdictions have determined that a landlord's reasonable judgment and a landlord's business judgment are not synonymous.

7. Dress Shirt Sales, Inc. v. Hotel Martinique Assoc., 239 N.Y.S.2d 660 (1963); Mann Theatres Corp. of Cal. v. Mid-Island Shopping Plaza Co., 464 N.Y.S.2d 793 (2d Dep't 1983), *order aff'd*, 479 N.Y.S.2d 213 (1984); Caridi v. Markey, 539 N.Y.S.2d 404 (2d Dep't 1989); United States v. Epstein, 27 F. Supp. 2d 404 (S.D.N.Y. 1998).

8. *E.g.,* Fernandez v. Vazquez, 397 So. 2d 1171 (Fla. App. 1981); Speedway Superamerica, LLC v. Tropic Enters., Inc., 966 So. 2d 1 (Fla. App. 2007); Arrington v. Walter E. Heller Int'l Corp., 333 N.E.2d 50 (Ill. App. 1975); Tucson Med. Ctr. v. Zoslow & Adelman, 712 P.2d 459 (Ariz. App. 1985); Cafeteria Operators L.P. v. AMCAP/Denver Ltd. P'ship, 972 P.2d 276 (Colo. App. 1998).

Consider this scenario, generally based on an actual New York court case, but not an uncommon occurrence in the retail industry: Seafood Corp. is a tenant leasing space in a shopping center that operates a seafood restaurant. Seafood Corp. determines that its business is not doing well and that it needs to close, so it searches for a potential assignee for its lease. Seafood Corp. finds a potential assignee, Japanese Food Corp., which is interested in assuming the lease and using the leased premises to sell Japanese food. There is already an existing restaurant in the shopping center run by Japanese Food First LLC. Accordingly, when Seafood Corp. requests the landlord's consent to the assignment of its lease to Japanese Food Corp., the landlord refuses to consent to the transaction, since Japanese Food Corp. would be operating its premises in direct competition with Japanese Food First LLC. In the landlord's business judgment, there would not be enough business available for two restaurants selling Japanese food to operate successfully in the same shopping center. Yet courts have held that this is not reasonable grounds for the landlord to withhold its consent *unless either* (1) the lease expressly provides that potential competition with existing tenants' businesses can be grounds for the landlord to withhold its consent to a proposed assignment or sublease or (2) Japanese Food First LLC has an exclusive use provision in its lease with the landlord that prohibits the landlord from leasing space in the shopping center to any other party that would operate a restaurant selling Japanese food.[9] This follows the principle discussed above that courts will not restrict the alienation of real property more than the express restrictions set forth in the lease.

Another scenario in which this principle is applied is when a tenant is in nonmonetary default under its lease at the time that the tenant requests the landlord's consent to a proposed assignment or sublease. Some landlords may assume that they would be reasonable in withholding their consent to a proposed assignment or sublease if their tenant is in nonmonetary default under the lease at the time of the tenant's request. Nevertheless, unless the lease specifically provides that the tenant not being in default under the lease is a condition precedent to the landlord being reasonable in granting its consent to a proposed assignment or sublease, the courts will not accept that justification as reasonable grounds for the landlord refusing its consent to a proposed assignment or sublease.[10] Accordingly, in order to permit the landlord's reasonable judgment in granting its consent to a proposed assignment or sublease to be based on the landlord's business judgment, the landlord's attorney should draft conditions precedent consistent with the landlord's business considerations that must be satisfied by the tenant before the landlord will be reasonable in consenting to a proposed assignment or sublease.

Given the importance to tenants of having the lease obligate the landlord to be reasonable in granting its consent to a proposed assignment or a proposed

9. KIOP Forest Ave., L.P. v. S. Smokehouse of Staten Island, Inc., 28 Misc. 3d 1214A (N.Y. Civ. Ct. 2010); Int'l Chefs Inc. v. Corp. Prop. Investors, 658 N.Y.S.2d 108 (2d Dep't 1997); *In re* Ames Dep't Stores, Inc., 127 B.R. 744 (Bankr. S.D.N.Y. 1991).

10. Hunan 7 (N.Y.C.), Inc. v. John Ding, 628 N.Y.S.2d 534 (1995); FHR Auto Sales, Inc. f/k/a Ridley Ford, Inc. v. Fedele Scutti, 534 N.Y.S.2d 266 (1988).

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sublease, tenants' attorneys should be wary of any conditions precedent that could be difficult for the tenant to satisfy.

A common condition precedent found in many leases is the following: "Tenant is not in default under this Lease (1) at the time that Tenant requests Landlord's consent to the proposed assignment or sublease or (2) on the date on which the proposed assignment or sublease becomes effective." As drafted, even a seemingly innocuous default by the tenant could negate the landlord's obligation to be reasonable in granting its consent to a proposed assignment or sublease because there is no materiality threshold in this condition precedent. In addition, the tenant would not have the benefit of first receiving a default notice from the landlord and having an opportunity to cure the applicable default, so the landlord could wait until the tenant requests its consent to a proposed assignment or sublease to advise the tenant of an ongoing default in order to unreasonably withhold its consent to the proposed assignment or sublease.

To put this into proper perspective, if the tenant does not lower its blinds one day (despite being required to do so in its lease), then under this condition precedent the landlord conceivably could unreasonably withhold its consent to an assignment or a sublease proposed by the tenant as a result of this innocuous and temporary default. Thus, tenants' attorneys should be careful to modify this condition precedent to add a materiality threshold and a notice and cure period. To do so, the provision should be changed from merely stating that the tenant is not in default under the lease to stating the following: "Tenant is not in monetary default or material nonmonetary default under this Lease after receiving a notice of such default from Landlord and the expiration of the applicable cure period therefor."

Tenants' attorneys also should be wary of conditions precedent in a lease that are subjective in nature. An example of such a condition precedent is the following: "The proposed assignment or sublease must be in a form and substance that is acceptable to Landlord." This condition precedent should either (1) be modified to add a reasonable standard for the acceptability to the landlord of the assignment or sublease, or (2) be replaced with enumerated provisions that the assignment or sublease must contain (e.g., the term of the sublease will expire at least one day before the expiration date of the lease, the sublease will be subordinate to the provisions of the lease). Without making one of these modifications to this condition precedent, the landlord could have sole discretion in withholding its consent to the tenant's proposed assignment or sublease.

Another example of a subjective condition precedent is the following: "The proposed assignee or subtenant must be of a character and have a reputation that, in Landlord's judgment, is consistent with Landlord's standards for the Building." As drafted, the landlord is the sole party who can determine the landlord's standards for the building, essentially making this condition precedent subject to the landlord's sole discretion. To mitigate this concern, tenants' attorneys should modify this condition precedent to delete the words "in Landlord's judgment" and provide either that (1) the landlord's standards for the building will be evidenced by the tenants that are then occupying the landlord's building or (2) instead of requiring the proposed assignee or subtenant to be consistent

with the landlord's standards for the building, the assignee or subtenant should be required to be consistent with the standards of tenants in comparable buildings in the city in which the landlord's building is located. Either of these modifications would turn this condition precedent from a purely subjective standard determined by the landlord into a more objective standard that can be determined by third parties.

VI. IMPACT OF OTHER LEASE PROVISIONS

In addition to the assignment and subleasing section of the lease, there are other provisions in the lease that often are overlooked by attorneys when considering their impact on a tenant's ability to enter into subleases or assignments in the future. One such provision, which is often overlooked in commercial lease negotiations because of its perceived simplicity, is the use provision. At times, landlords, tenants, and their respective counsel merely review a use provision to confirm that the tenant's intended use of the leased premises is set forth accurately and then errantly overlook the nuances and mechanics of how the actual provision is drafted. They do so because they are unaware that the particular wording of a use provision in a commercial lease not only dictates how a tenant can use the demised premises but also can substantially affect a tenant's other rights under its lease, ranging from alterations to assignment and subleasing.

If the use provision is narrowly drafted and, as an example, provides that the leased premises may be used as a "book store and for no other purpose whatsoever," then the tenant will be able to assign the lease or sublease the leased premises only to a party that will continue to use the leased premises as a book store. To change the use of the leased premises, the tenant will be required to obtain the landlord's consent, which consent the landlord can unreasonably withhold in its sole discretion since the tenant effectively is asking for a modification of a material term of the lease, which the tenant has no right to modify unilaterally. (For purposes of this chapter, we will not address the ramifications of a bankruptcy proceeding, which in some instances can force a landlord to accept new uses that are not expressly provided for in the applicable assumed lease—see chapter 20 of this book for such a discussion. To prevent this scenario in which the tenant has substantially limited its market of potential subtenants and assignees, the tenant's attorney should either (1) draft the use provision broadly to permit the tenant to use the leased premises for all uses permitted by the certificate of occupancy for the building (provided that none of the proposed uses conflicts with any exclusive rights granted by the landlord to other tenants in their respective leases) or (2) expressly provide in the assignment and subleasing section of the lease that the landlord will not unreasonably withhold its consent to a sublease or assignment that proposes to change the use of the leased premises if the proposed use is permitted by the certificate of occupancy for the building and does not conflict with any exclusive rights granted by the landlord to other tenants in their respective leases.

Another provision in the lease that can have a major impact on persuading the landlord to be reasonable in granting its consent to a proposed sublease or

assignment is the section in the lease addressing damages. If a lease is silent as to the damages that the tenant would be entitled to recover for a landlord's breach of its obligation to be reasonable in granting its consent, then the tenant may be entitled to collect damages, and under certain circumstances, the tenant may even be entitled to maintain a cause of action for tortious interference with business relations. This significant liability certainly would incentivize the landlord to comply with an obligation in its lease to be reasonable in granting its consent to a potential sublease or assignment. The more common scenario, however, is that if a landlord is being unreasonable in withholding its consent contrary to the requirements in its lease, the lease limits a tenant's available remedies to bringing an action against the landlord for specific performance and obtaining an injunction. In this event, even if a tenant has clearly obligated a landlord to be reasonable in granting its consent to a proposed sublease or assignment and the landlord does not comply with this requirement, the tenant's only recourse would be to sue the landlord in order to force the landlord to grant its consent to the transaction. Depending on the circumstances, the potential assignee or subtenant may not be interested in the leased premises by the time that the litigation between the landlord and the tenant concludes. As such, after winning the lawsuit, the tenant may no longer have a sublease or assignment intact with respect to which the landlord can grant its consent. A potential compromise between the landlord and tenant may be for the lease to require binding expedited arbitration in the event of a conflict. The short time period for resolution could keep the potential assignee or subtenant in place long enough to resolve the conflict between the landlord and tenant, and still have the sublease or assignment take effect. Accordingly, attorneys must be focused on not only the requirements of the assignment and subleasing provisions in a lease but also on the methods in the lease that are available to their clients to enforce the applicable requirements.

VII. CONCLUSION

To provide landlords and tenants with the protections in the lease that are critical to their respective control of the leased premises, the assignment and subleasing provisions should be carefully reviewed and explicitly drafted by attorneys to account for their clients' needs. What ultimately counts in the courtroom is what the lease says and not what was intended. Accordingly, in order to "make everything as simple as possible, but not simpler," one must recognize that drafting well, not drafting simply, is what ultimately empowers the parties with the necessary protections that they need in order to maintain options and control over an unpredictable future.

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