

nyrej

THE LARGEST COMMERCIAL/INVESTMENT REAL ESTATE NEWSPAPER IN THE STATE

Reprint

nyrej.com

Tuesday, November 20, 2018

Commercial and residential leases should contain at least one conditional limitation



Stephen Lasser
Lasser Law Group, PLLC

A conditional limitation is a lease provision that provides for the automatic termination of the lease upon a tenant's failure to cure a default.

Every commercial and residential lease should contain at least one conditional limitation. A conditional limitation is a lease provision that provides for the automatic termination of the lease upon a tenant's failure to cure a default. In New York, most leases have separate and different conditional limitation provisions for non-monetary and monetary lease defaults, although frequently in both commercial and residential leases there is no conditional limitation for monetary defaults at all, thereby requiring landlords to rely solely on statutorily authorized non-payment proceedings to cure monetary defaults. In addition, even though many residential leases, including cooperative proprietary leases, contain conditional limitations addressing both non-monetary and monetary defaults, currently, New York courts will not enforce conditional limitations addressing monetary defaults in residential leases because they have been ruled to be against public policy.

In order to understand how conditional limitation provisions work, it is helpful to know that there are basically only two main types of New York landlord-tenant proceedings that landlords can utilize to evict a tenant in default: holdover proceedings and non-payment proceedings.

In its most traditional form, a holdover proceeding is commenced by a

landlord to remove a tenant when a tenant fails to vacate (i.e., holds over) in a leased space after the lease term has expired. For example, after the last day of a ten-year office or retail lease, the tenant continues to operate its business in the leased space without the landlord's consent and without a signed renewal.

A conditional limitation provision in a lease allows the landlord to accelerate the lease expiration date to a date in the near future after serving the tenant with a notice to cure a default within a specified time (for example 15 days), and will thereby convert a tenant under a current lease who fails to cure a lease default into a former tenant holding over in the leased space. Then the landlord can commence a holdover proceeding to remove the former tenant. Once a lease has been terminated via a conditional limitation, it generally cannot be reinstated, particularly if it is a commercial lease.

An abbreviated example of a typical conditional limitation addressing non-monetary defaults is the following:

"Default: If tenant defaults in fulfilling any of the covenants of this lease other than the covenants for the payment of rent, upon Landlord serving a written fifteen (15) day notice upon tenant specifying

the nature of said default, and upon the expiration of said fifteen (15) days, if tenant shall have failed to comply with or remedy such default, this lease shall end and expire as fully and completely as if it were the day herein definitely fixed for the end and expiration of this lease."

Some of the typical non-monetary defaults that would be covered by the above conditional limitation are failure to obtain landlord's permission to make alterations; failure to make required repairs; failure to maintain and provide proof of insurance; and assigning or subletting lease without landlord's consent.

The only lease default that can be addressed in a non-payment proceeding is a tenant's failure to pay rent. A non-payment proceeding is initiated by serving a statutorily required predicate rent demand notice upon the tenant. Subsequently, the landlord serves a petition on the tenant further detailing the rent default and then upon the landlord proving to the court the amount owed by the tenant, the court will award a judgment of possession and warrant of eviction, which will allow the landlord to execute the warrant and physically evict the tenant from the leased space.

Upon the completion of the eviction, the tenant's lease will be termi-

nated. However, a tenant may cure its monetary lease default at any time prior to the completion of the eviction by tendering the rent owed and, in some instances, a court will even reinstate a tenant's lease and restore a tenant to possession post-eviction.

Commercial landlords should consider including a conditional limitation provision in their leases, which would allow them to terminate a lease upon a tenant's failure to cure a rent default. This would enable the landlord to file a holdover proceeding to evict a tenant that has failed to pay rent as an alternative to filing a non-payment proceeding. Surprisingly, many commercial landlords do not include this potential rent collection remedy option in their leases, which usually would be faster than litigating a non-payment proceeding.

One situation where the potential speed advantage of a holdover proceeding based upon a commercial tenant's failure to pay rent may be particularly preferable is when the landlord is more interested in evicting the tenant and recovering the leased premises than collecting the rent owed.

Another example is when there is a high risk of the tenant declaring bankruptcy. Once a conditional limitation cure period expires, a commercial lease is terminated and a subsequent tenant bankruptcy would not reinstate the lease or prevent a landlord from completing an eviction.

Stephen Lasser is a managing partner at Lasser Law Group, PLLC, New York, N.Y.