COMMERCIAL TENANT RENT DEFAULTS

How to Handle them…

CLE materials prepared for the
NYSBA Real Property Section
Commercial Leasing Committee

November 2017

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A DAY (OR TWO) IN THE LIFE OF A COMMERCIAL LANDLORD AND TENANT LITIGATOR

"I drafted a commercial lease. The tenant defaulted. I wonder what happens when my lease gets litigated…"

CLE materials prepared for the NYSBA, Real Property Section, Commercial Leasing Committee, lunch meeting

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"I drafted a commercial lease. The tenant defaulted. I wonder what happens when my lease gets litigated…"

I. INTRODUCTION TO THIS PRESENTATION

You are done drafting that commercial lease. Maybe you represented the landlord. Maybe you represented the tenant. Your client was happy. You got paid. Both parties went away with enthusiasm for the future, at the threshold of a new chapter for their businesses and the physical space. You close the file.

But what happens when there is…a default? Now your lease is put to the test.

The author of these CLE materials is a landlord and tenant litigator in the City of New York for over twenty years. I work on both commercial and residential litigations. I represent both landlords and tenants. **I do NOT draft commercial leases!** Alas, I am not there when the champagne is passed around on the day the lease is executed. No one thinks to call me to share in the good times. I do spend my days, however, hunched over big thick commercial leases and their riders, amendments, modifications, and attendant guarantees. People call me when things go wrong.

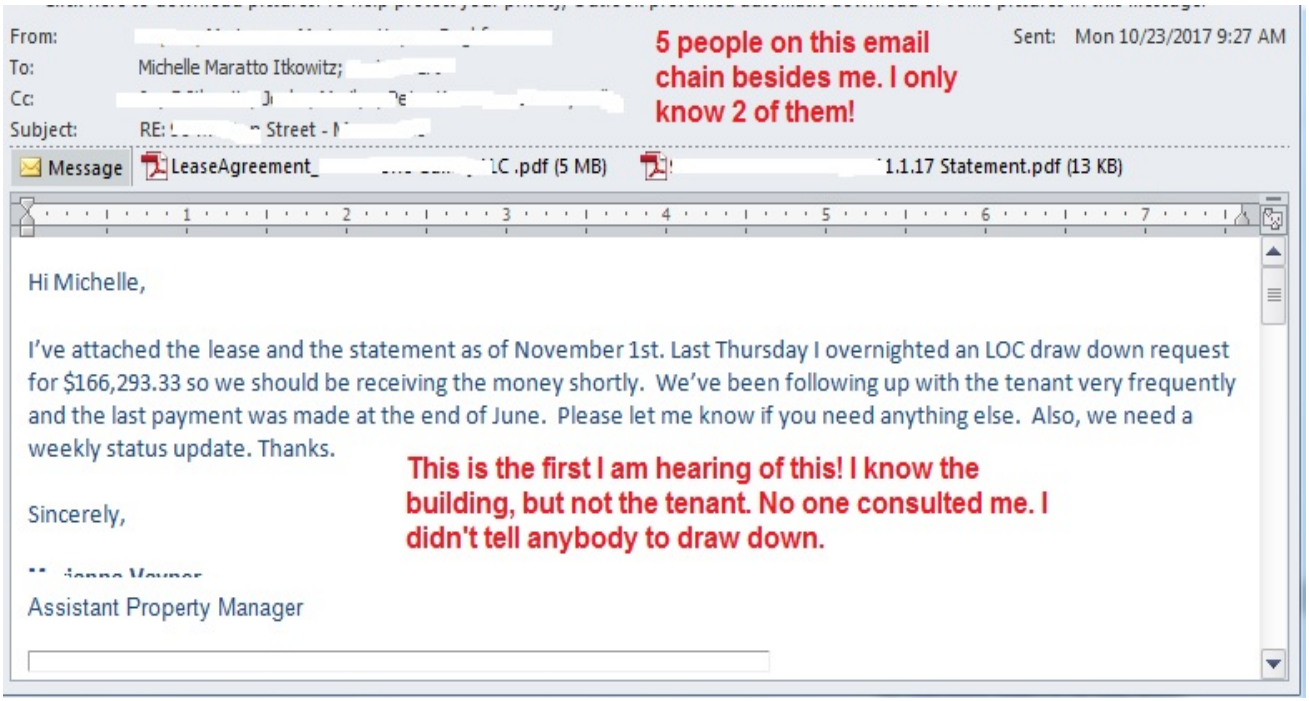
This continuing legal education program is designed to share with drafters how the lease clauses they construct perform in a fairly typical commercial landlord and tenant litigation, by taking the audience through an ACTUAL (and the most recent) case that came across my desk. I will present the material in the order in which I, as a litigator, am forced to think about it. We will explore:

- The description of the premises and the floor plan
- The default and remedies clauses of the lease
- The security clauses
- Additional rent
- The conditional limitations
- Service of process in a landlord and tenant proceeding
- The interplay between the lease and the guaranty

I am interested in hearing the audience's feedback about how clauses could be set up differently and why they are drafted the way they typically are.

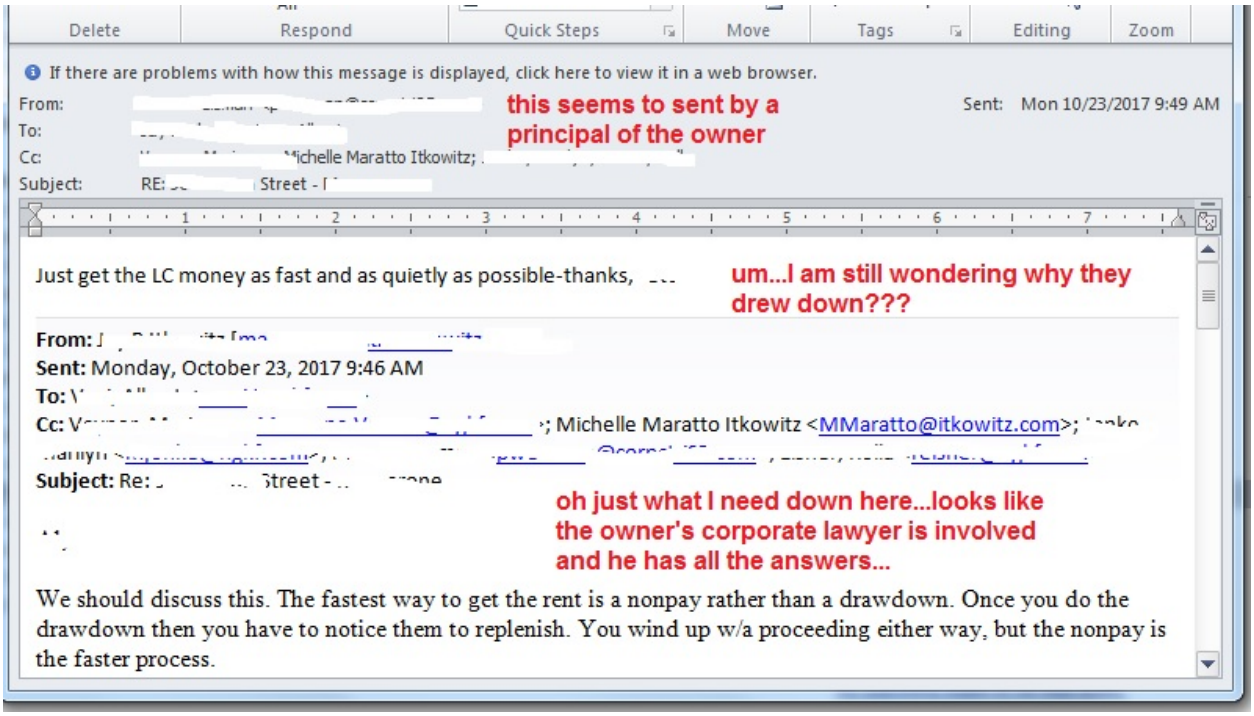
II. THE CASE COMES IN – PRELIMINARY MATTERS

I am sitting at my desk, minding my own business, and in comes this email, happy Monday morning, Michelle:



This is a managing agent who sends me work. I have done work for the managing agent's ownership client in this building before, but not in a while. I have never worked on anything to do with this tenant. The email presupposes I know anything at all about this.

The first email is followed, very shortly, by this little gem:



Ok. This email is being sent to me by a managing agent I have a long relationship with. I have worked on this building in Manhattan before. It is a nice commercial building.

But I have never heard of this tenant. No one has ever consulted me on this matter before. I have no idea how they got to the point of drawing down on a letter of credit. In general, I seldom recommend drawing down, unless a relationship is coming to an end. Security is, after all, security.

Moreover, there are five people on this chain besides me. I know only two of them. I can tell by the email addresses that two people (who I do not know) are not employees of the managing agent. One email address leads me to the conclusion that this person is probably general counsel to the owner. The guy with the ".aol" email address is probably a principal of owner.

What's worse, is that orders are being barked in this email chain. I am not entirely sure they are all being barked at me.

I have no idea what is going on.

When I was a younger woman, I would have jumped right in and tried to act competent and compliant. *"Yes! Indeed! Let's get that LC money!!"* I am no longer a young woman…

The first question I had was this –

Who are all you people?!

The first question I have learned to ask is this – who is everybody on this chain please? I am HAPPY to try and help. But I need to know who I am talking to and how you all fit together. I need some context. After I have that, as a litigator I need a ***communications plan***. I need to know if I simply hit "Reply All", or if there are only certain people with whom I should be communicating.

Here, my instincts about who was who were correct and I was told to hit "Reply All."

My next question had to be presented delicately…who the heck decided to draw down? I was more diplomatic about it, and absorbed that question into the over-arching question –

What's the goal?

A landlord and tenant litigator always has to begin with the question – what is the goal here?

- Is owner trying to recover the space?
- Does owner just want to get paid?
- Is the owner hoping to reformulate the deal somehow?

By the way, if I am represent a commercial tenant, I also have to ask the goal.

- Is tenant looking to leave/move?
- Does tenant want time to get itself back into compliance?
- Is the tenant hoping to reformulate the deal somehow?

Here, I was told that the owner wanted the tenant to pay.

Let's start looking at the lease.

III. CASE ABSTRACT – LET'S START LOOKING AT THE LEASE

I begin every case - even the simplest case - with what I call a "case abstract". I look at a list of things either in the lease chain, in the landlord's files, or online.

What did I have here? I will tell you what I saw, and explain the significance of why I look for most of this as we go forward.

The building is all commercial, with no construction going on and no DOB violations, and has been owned by this LLC since the 1990's. The tenant was a prominent art gallery, with another location in Los Angeles.

The lease was from 2006 and was for the entire first floor and some of the basement. There was a First Modification in 2012, adding storage space in the basement and access to the building's loading dock. The First Modification extended the termination date to 2021. The use is for a contemporary art gallery.

The base rent was about $36k per month. Tenant owed $300k before the drawdown and about $92k after.

A. The Description of the Premises

The lease described the original premises with two floor plans, they looked ok. The First Modification added two floor plans. I noticed a difference between the two floor plans for the main lease and the floor plans for the First Modification. The discrepancy was that the floor plans for the main lease were not showing the whole footprint of the building; rather they were just showing the half where the gallery was, and cross-hatching that. The floor plans in the First Modification showed the buildings full perimeter, so the gallery looked much smaller on this set of plans. The floor plans were confusing, but they conflicted with neither each other or the textual description in the lease so I can use them.

Why am I so worried about the floor plans? Real Property Actions and Proceedings Law ("RPAPL') § 741(3) requires Petitioner to describe in the petition, "the premises from which removal is sought." An adequate description of the premises is one that accurately describes the exact location of the premises in sufficient detail to allow a marshal executing a warrant to locate the premises at issue and effectuate the eviction without additional information.[1]

See *Seward Park Housing Corp. v. Flowers on Essex, LLC*, 47 Misc.3d 1213(A) (Civ. Ct. NY Cty. 2014):

> Paragraph four of the petition describes the premises as *"the fenced in portion of courtyard behind stores located in building known as 357–389 Grand Street as depicted as cross-hatched area*

[1] *Sixth Street Community Center, Inc. v. Episcopal Social Services*, 19 Misc.3d 1143(A) [Civ Ct N.Y. Co 2008].

> *on annexed floor plan accessed through 365 Grand Street, New York, New York 10002 ..."* Annexed to the petition is a diagram with cross-hatched markings identified as *"red fence area"*. On one side of the *"red fence area*" is what is labeled as *"Seward Park High School"*, on another side of the *"red fenced area"* is something labeled *"MTA vent"*, on a third side is *"shed Bialy"* and on the fourth side is an area that runs the length of the *"red fence area"* identified as the *"access walkway"*. Photographs annexed to Petitioner's opposition papers described as depicting the premises sought (and not disputed by Respondent in its reply papers) show a red cement area enclosed by a tall wooden red fence.
>
> The Court finds that the petition adequately describes the premises. The marshal will be able to locate the premises with the description that the area sought is behind the building known as 357–389 Grand Street and is accessed through 365 Grand Street. The marshal will be able to effectuate the eviction because the diagram depicts the area Petitioner seeks to recover as the *"red fence area"* (which it is undisputed is in fact red) and it shows what surrounds the "red fence area". Therefore, the Court determines that the marshal would not need any additional information to locate the premises and effectuate the eviction.

B. Problems to Look for With Additional Rent

In the case we are examining, tenant owed routine items – Base Rent, Electric, Real Estate Tax Escalation, and Late Fees.

When I see that I am being instructed to sue for Additional Rent[2] , I have three questions.

1. Is the additional really due?

Is the additional rent really due? For example – I have seen landlords try to bill tenants for things they shouldn't be entitled to. Like trying to bill building-wide architectural fees to a tenant as "repairs." You need to check the lease for the authority to bill the item as additional rent.

[2] In the commercial context, unlike the residential, there is regular monthly rent, and then there is also "Additional Rent" – payments that the tenant has to make the landlord for all kinds of other items. Usually these things are priced outside of the rent because they are changeable and unpredictable. For example, electricity or real estate tax escalations. If the taxes on the building go up over the years, commercial tenants agree to shoulder a portion of the increase. Extra charges for repairs and key cards are also additional rent.

2. If the additional rent is really due, was it calculated in a defensible way?

If the additional rent is really do, was it calculated in a defensible way? Many of these items require a little math. For real estate tax escalations the lease usually says subtract the base year from the current taxes and then the tenant pays a percentage, usually commensurate with their percentage of the building. I like to make sure they did the math right.

3. Was the additional rent billed correctly?

Was the additional rent billed correctly? Unlike regular monthly rent, which is usually due without demand as per the lease, Additional Rent does, indeed, need first to be billed. How else would the tenant even know it was due? Thus, tenant needs to be billed in accordance with whatever the lease says about such things. Many leases say something like the landlord needs to present tenant with a bill for additional rent and tenant gets 10 days to pay and some leases even say how that bill has to be sent and who it has to be sent to.

C. Additional Addresses and Service of Process

Here, I found some alternative addresses for the Tenant:

- There was an additional address in the lease preamble.
- There was an additional address in the notice section of the lease. The notice provision requires me to do 3-way mailings – regular mail, certified mail, and certified return receipt requested. I have to send copies to the tenant's lawyer. Anything I serve by mail is effective three business days after it is mailed.
- There was an additional address in the preamble of the First Modification.
- There was a home address for the guarantor on the guaranty. I always make it a habit to send a copy of the legal papers to the guarantor.

1. Process Service – In General

A court cannot make a decision that applies to a person or company unless it has personal jurisdiction over that person or company. Personal jurisdiction is a courts' power to bring a person or company into its adjudicative process. One of the things that a person who wants to sue a person or company must do to cause the court to have personal jurisdiction over a person or company is serve the person or company with process.

"Process" is a legal document that directs an appearance or response to a legal action or proceeding. Process includes such documents as a notice of petition and petition, a summons and complaint, a rent demand, a thirty day notice of termination, or a subpoena.

A process server is one who "serves" process.

With certain exceptions, a person must be licensed by the New York City Department of Consumer Affairs to serve process. One exception is that one who serves process less than five times in one year is exempt from needing a license.

RPAPL § 735 is the section that covers the service of rent demands, notices of petition and petitions. Lease provisions cannot alter or modify the § 735 service requirements. Service of process for non-landlord and tenant matters is governed by CPLR Article 3. Note that RPAPL § 735 service is somewhat different than regular CPLR service.

RPAPL § 735 states:

> *§ 735. Manner of service; filing; when service complete*
>
> *1. Service of the notice of petition and petition shall be made by personally delivering them to the respondent; or by delivering to and leaving personally with a person of suitable age and discretion who resides or is employed at the property sought to be recovered, a copy of the notice of petition and petition, if upon reasonable application admittance can be obtained and such person found who will receive it; or if admittance cannot be obtained and such person found, by affixing a copy of the notice and petition upon a conspicuous part of the property sought to be recovered or placing a copy under the entrance door of such premises; and in addition, within one day after such delivering to such suitable person or such affixing or placement, by mailing to the respondent both by registered or certified mail and by regular first class mail,*
>
> *(a) if a natural person, as follows: at the property sought to be recovered, and if such property is not the place of residence of such person and if the petitioner shall have written information of the residence address of such person, at the last residence address as to which the petitioner has such information, or if the petitioner shall have no such information, but shall have written information of the place of business or employment of such person, to the last business or employment address as to which the petitioner has such information; and*
>
> *(b) if a corporation, joint-stock or other unincorporated association, as follows: at the property sought to be recovered, and if the principal office or principal place of business of such corporation, joint stock or other unincorporated association is not located on the property sought to be recovered, and if the petitioner shall have written information of the principal office or principal place of business within the state, at the last place as to which petitioner has such information, or if the petitioner shall*

> *have no such information but shall have written information of any office or place of business within the state, to any such place as to which the petitioner has such information. Allegations as to such information as may affect the mailing address shall be set forth either in the petition, or in a separate affidavit and filed as part of the proof of service.*
>
> *2. The notice of petition, or order to show cause, and petition together with proof of service thereof shall be filed with the court or clerk thereof within three days after;*
> *(a) personal delivery to respondent, when service has been made by that means, and such service shall be complete immediately upon such personal delivery; or*
> *(b) mailing to respondent, when service is made by the alternatives above provided, and such service shall be complete upon the filing of proof of service.*

There are **FIVE** elements to serving process:

(1) Delivery of the papers
(2) GPS-ing the service
(3) Mailing the papers
(4) Filing proof of service with the court
(5) Completing and maintaining the process server log book

2. Delivery of the Papers

a. Delivery Options set forth in RPAPL § 735

- Personal Service on an Individual. Personal delivery to respondent who is an individual.

- Personal Service on a Corporation. Personal service on a corporation must be made on an officer, director, managing or general agent, cashier or other person authorized to accept service on behalf of the corporation, in compliance with CPLR § 311 (a)(1). **RPAPL does not permit service on a corporation via the secretary of state.**

- Substituted Service ("Suitable Age and Discretion"). If respondent is not able to be personally served, a copy of the papers may be left with a person of suitable age and discretion who resides or is employed at the premises sought to be recovered. Substituted service must be made at the premises sought to be recovered.

- Conspicuous Place Service ("Nail and Mail"). Only after reasonable application to serve respondent(s) by personal or substituted service fail, a copy of the notice and petition may be "affixed" to the door or a conspicuous place on the premises. There is a plethora of law on this topic. The following is a good rule to follow: Unless the landlord has specific information about when the tenant is likely to be found in the premises, (in which case, that is the time to attempt service), in residential evictions, a reasonable application means the process server makes three attempts to find the tenant home, a first attempt before 8:00 a.m., a second attempt during regular business hours, i.e. between 9:00 a.m. and 5:00 p.m., and a third attempt after 6:00 p.m. at night. For commercial evictions, reasonable application means the process server makes at least two attempts to find the tenant at the premises, during two different times of day (or night) which encompass tenant's regular business hours. For example, go to an office during regular business hours; go to a nightclub during the evening.

b. An Important Note on Delivery Options in Commercial Cases

There are 3 types of delivery – (1) personal, (2) suitable age and discretion and (3) conspicuous place. **Numbers 1 & 2 are EQUALS**. Number 3 is inferior – in that you may NOT use #3 unless you have tried for either #1 or #2. But here's the thing people get a little confused about – you do NOT have to attempt #1 before resorting to #2. They are equal! Suitable age and discretion service is as good as personal service.

Therefore, my policy is to SKIP personal service and go straight for suitable age and discretion. Why? Because personal is harder to get than suitable age and discretion. If it is a corporation, then personal service on a corporation requires reference to another statute. And that statute requires you to find an officer or director or person authorized to accept service. I do not want to have a traverse over whether someone was an officer or was authorized. Why do we need to do that?

Under suitable age and discretion all I need to find is a person of suitable age of discretion. It has nothing to do with "officer, director, authorized, etc." And it is just as good in the first instance as personal service.

Therefore, you as the process server do not ever need to trouble your mind with whether a person is an officer or director or authorized-service-accepter for any of these services, unless you are instructed by an attorney otherwise. You are just dealing with finding a person of suitable age and discretion employed at the premises.

Here is a funny (and sad, but true) story to illustrate this point. I used an outside process server (not my own server; this service seemed like it might be a bit dicey, and I only send my server to safe places). He did an emergency service for me on a bar, way out in Queens. He took it upon himself to NOT mail the papers as well as deliver them. I asked him why. He told me that it was "personal service on a corporation" and, therefore, he did not need to mail the papers. I asked why he thought he had achieved "personal service on a corporation". He informed me that

he served the bartender, and she was taking money from people and putting it into a cash register. That made her a "cashier". I asked him, "Do you know that a bartender is a 'cashier' for purposes of CPLR § 311?" And he told me, "Well, it must be." OH REALLY? I checked. I found only one case on the topic of whether a bartender was a "cashier" for service of process purposes. And it says that a bartender is NOT a "cashier" for purposes of the relevant service statute.[3] You can't make this stuff up. Thus, I strongly favor substituted service on a corporation.

D. Extension of Time for a Rent Demand

Paragraph 29(A) of our lease extends my time for a statutory rent demand to 7 days.

A rent demand on at least three days' notice is a required predicate of a summary nonpayment proceeding.[4] The three-day requirement may be lengthened by the lease.[5]

E. The Security Section of the Lease

The security section of our lease calls for a letter of credit or cash security and it's long. Actually, I will show you how I ocr-ed it and diagramed it, to make sure I understood it:

SECURITY

46. A. Tenant has deposited with Landlord the sum of $400,000.00 as security (the "Security Deposit") for the faithful performance and observance by Tenant of the terms, provisions and conditions of this Lease; it is agreed that in the event Tenant defaults in respect of any of the terms, provisions and conditions of this Lease, Landlord may use, apply or retain the whole or any part of the security so deposited to the extent required for the payment of any sum as to which Tenant is in default. In the event that Tenant shall fully and faithfully comply with all of the terms, provisions, covenants and conditions of this Lease, the security shall be returned to Tenant after the date fixed as the end of this Lease and after delivery of entire possession of the Demised Premises to Landlord. In the event of a sale of the land and Building or leasing of the Building, Landlord shall transfer the security to the vendee or lessee and Landlord shall thereupon be released by Tenant from all liability for the return of such security.

[3] *People v. Alrich Restaurant Corp.*, 53 Misc.2d 574 (Dist. Ct. Nassau Cty. 1967).

[4] *See* RPAPL § 711(2).

[5] *Hendrickson v. Lexington Oil*, 41 A.D.2d 672 (2d Dept. 1973).

***

D. If, as a result of any application of all or any part of the Security Deposit, other than in connection with the Work Fund (as hereinafter defined) the total amount of the Security Deposit being held by Landlord shall be less than $400,000.00 (subject to Tenant's use of the Work Fund) or the amount secured by the letter of credit shall be less than $111,000.00, Tenant shall **forthwith** provide Landlord with additional funds and/or letter(s) of credit in an amount equal to the deficiency.

***

F. Without limiting the generality of the foregoing, if the letter of credit expires earlier than sixty (60) days after the expiration of the Demised Term, or the issuing bank notifies Landlord that it shall not renew the letter of credit, Landlord will accept a renewal thereof or substitute letter of credit (such renewal or substitute letter of credit to be in effect not later than thirty (30) days prior to the expiration thereof), irrevocable and automatically renewable as above provided to sixty (60) days after the end of the Demised Term upon the same terms as the expiring letter of credit or such other terms as may be acceptable to Landlord. However, (i) if the letter of credit is not timely renewed or a substitute letter of credit is not timely received, (ii) or if Tenant fails to maintain the letter of credit in the amount and terms set forth in this Article, Tenant, at least thirty (30) days prior to the expiration of the letter of credit, or immediately upon its failure to comply with each and every term of this Article, must deposit with Landlord cash security in the amounts required by, and to be held subject to and in accordance with, all of the terms and conditions set forth in paragraph (A) of this Article, failing which the Landlord may present such letter of credit to the bank, in accordance with the terms of this Article, and the entire sum secured thereby shall be paid to Landlord, to be held by Landlord as provided in this Article.

F. Conditional Limitations

Back to our lease - Paragraph 28(A)(i) makes non-payment of rent a default subject to a conditional limitation, on a 7-day notice to cure and a 5-day notice of termination.

Paragraph 28(A)(ii) makes it a defaulting under any other provision of the lease subject to a conditional limitation, on a 20-day notice to cure and a 5-day notice of termination.

One of the landlord's most powerful remedies, a default subject to a conditional limitation pursuant to the lease, permits the landlord to terminate the lease by following certain procedures.

1. Types of Defaults Subject To Conditional Limitations in a Lease

a. Non-Rent Defaults Subject to Conditional Limitations

The following are events of default subject to a conditional limitation under a typical form of Store Lease:

> If the Tenant defaults in fulfilling any of the covenants of this lease other than the covenants for the payment of rent or additional rent; or if the demised premises becomes vacant or deserted; or if any execution or attachment shall be issued against Tenant or any of Tenant's property whereupon the demised premises shall be taken or occupied by someone other than Tenant; or if the lease be rejected under Section 365 of Title II of the U.S. Code (Bankruptcy Code); or if Tenant shall have failed, after five (5) days written notice, to redeposit with Owner any portion of the security deposit hereunder which Owner has applied to the payment of any rent and additional rent due and payable hereunder; or if Tenant shall be in default with respect to any other lease between Owner and Tenant; or if Tenant shall fail to move into or take possession of the premises within thirty (30) days after the commencement of the term of this lease….

Other defaults which may be included in the lease as subject to a conditional limitation are:

- assigning, mortgaging or encumbering the lease or subletting without the landlord's permission
- the filing of a mechanic's lien against the premises which is not discharged within a period of time after notification of the tenant by the landlord
- the failure to maintain insurance
- assigning the lease, or any interest in the lease, transfer ownership of the lease
- illegal sublets

- closing for a period of ten or more days not for landlord authorized renovations

b. Nonpayment of Rent as a Conditional Limitation

Although the many leases specifically exclude such, a lease can provide a mechanism whereby the landlord may terminate the lease, after default in the payment of rent, in the commercial context. Properly drafted, a conditional limitation clause for the nonpayment of rent in a commercial lease will be enforced by the courts and is, perhaps, the landlord's most powerful remedy, nonpayment being the most common default. This is particularly true where the market has quickly improved and the lease-rent has fallen "below market." A properly structured conditional limitation for the non-payment of rent should utilize the language cited approvingly by the court in *Grand Liberte Co-op Inc. v. Billhaud*[6], expressly making the conditional limitation applicable to rent defaults and stating that "it [is] the intention of the parties hereto to create hereby a conditional limitation."[7]

Note, however, that this strategy will not work in a residential context. A conditional limitation regarding the nonpayment of rent in a residential lease has been held to violate public policy as it would provoke a forfeiture, and the law disfavors automatic forfeitures of residential tenancies.[8]

2. Notice to Cure

In many commercial leases, the landlord must first notify the tenant of the default and set forth a time period in which the tenant must cure the default; or, if it is impossible to cure within the time period, it must set forth a time period in which the tenant must begin curing the default. The time period in many commercial leases is fifteen (15) days. This notice is commonly referred to as a "notice to cure" or "notice of default."

3. "Yellowstone" and Tolling Time to Cure Defaults

Giving a notice to cure may force the commercial tenant to initiate a proceeding in Supreme Court commonly referred to as a "*Yellowstone*," so called after the case of *First National Stores v. Yellowstone Shopping Center*.[9] The essence of a *Yellowstone* proceeding is a declaratory judgment complaint accompanied by a stay application (which is routinely granted, at least in the form of a temporary restraining order, pending a hearing on a preliminary injunction), which seeks a trial on the issue of whether the tenant is indeed in violation of the lease. This procedure is designed to toll the time the tenant would ordinarily have to cure a lease

[6] *Grand Liberte Co-op Inc. v. Billhaud*, 126 Misc.2d 961 (1st Dept. App. Term. 1984).

[7] *Id.*

[8] *Semans Family Ltd. Partnership v. Kennedy*, 177 Misc.2d 345 (N.Y.C. Civ.Ct. N.Y. Cty. 1998).

[9] *First National Stores v. Yellowstone Shopping Center*, 21 N.Y.2d 630 (1968), *rearg. denied*, 22 N.Y.2d 827 (1968).

violation while the court resolves the issue of whether the tenant is indeed in violation and/or has cured the violation. If the court finds the tenant in violation, then by virtue of the stay of the notice to cure, the tenant still has the opportunity to cure the violation before the cure period ends. This process in itself can buy the tenant significant time as the resolution of the proceeding can take months, if not years.

The purpose of a *Yellowstone* injunction is to maintain the *status quo* by means of a temporary stay while the tenant challenges the landlord's notice to cure.[10] Thus, the Yellowstone injunction tolls the cure period set forth in the landlord's notice of default until there is a judicial determination of the parties' rights.[11]

To demonstrate one's entitlement to a *Yellowstone* injunction, a tenant must demonstrate that he/she: (i) holds a valuable commercial lease (ii) has received a notice to cure; (iii) has requested injunctive relief prior to the termination of the lease; and (iv) is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises.[12] "These standards reflect and reinforce the limited purpose of a *Yellowstone* injunction: to stop the running of the applicable cure period."[13]

A *Yellowstone* injunction can provide a modicum of protection to landlords as well as tenants, because they are often conditioned upon the tenant's ongoing payment of rent and/or the posting of a bond to protect the landlord from a wrongfully issued injunction.

The First Department has held that commercial tenants have a right to a virtually automatic issuance of a *Yellowstone* injunction[14] and has held that in order to obtain a *Yellowstone*, rather than requiring the tenant to prove on his application that he can cure the alleged default, a tenant must merely state his desire and ability to cure the default by any means short of vacating the premises.[15] Furthermore, a tenant is entitled to a *Yellowstone* injunction

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[10] *See e.g., Jemaltown of 125th Street, Inc. v. Leon Betesh/Park Seen Realty Assocs.,* 115 A.D.2d 381 (1st Dept. 1985); *Fratto v. Red Barn Farmers Market Corp.,* 144 A.D.2d 635 (2nd Dept. 1988).

[11] *See, Finley v. Park Ten Associates*, 83 A.D.2d 537 (1st Dept. 1981); *South Ferry Building Co. v. J. Henry Schroder Bank & Trust Co.*, 91 A.D.2d 963 (1st Dept. 1983).

[12] *Garland v. Titan West Assocs.,* 147 A.D.2d 304 (1st Dept. 1989).

[13] *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Avenue Associates*, 93 N.Y.2d 508 (1999).

[14] *See Herzfeld & Stern v. Ironwood Realty Corp.*, 102 A.D.2d 737 (1st Dept. 1984); 34 N.Y.Jur.2d § 261 ("where a tenant denies any default and demonstrates that the landlord has given notice of default, and where a period of time remains within which to cure, the tenant is entitled to a grant of preliminary relief in the form of a Yellowstone injunction; since the law does not favor forfeitures, the tenant is not required, as a prerequisite to such relief, to demonstrate a likelihood of success on the merits or an ability to cure, and the proper inquiry instead is whether a basis exists for believing that the tenant desires to cure and has the ability to do so through any means short of vacating the premises").

[15] *Id.* at 738.

when the tenant argues that he is not in violation of the lease, and that if he is, he concedes to cure any such violations.[16]

If the tenant is successful in having the *Yellowstone* injunction implemented, then the landlord must answer the Supreme Court action and counterclaim for termination of the tenancy. This is an example of a landlord and tenant dispute in a summary proceeding being litigated in a forum other than civil court.

An invariable condition of a *Yellowstone* Injunction is that the tenant is ordered to pay rent during the pendency of the action.

4. Termination Notice

If no *Yellowstone* proceeding is commenced and the default is not cured or being cured by the date specified in the notice to cure or if the default is not curable (see below), then the landlord may notify the tenant that the lease will be terminated in a certain number of days. In such case, many commercial leases allow termination in five (5) days. This notice is commonly referred to as a "notice to terminate." After the expiration of the termination notice, the landlord may commence a summary holdover proceeding against the tenant to recover possession of the premises.

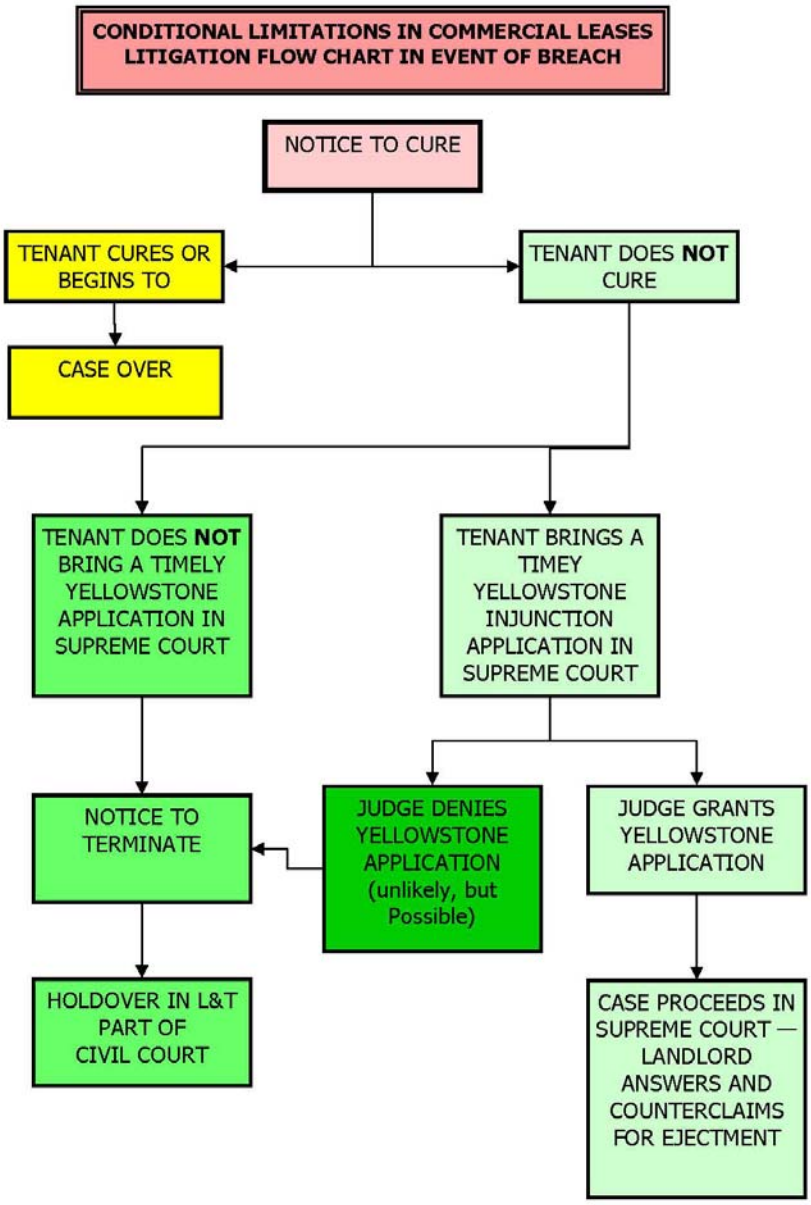
Notices to cure and notices to terminate pursuant to the terms of a lease are served on the tenant in accordance with the lease. No statute specifies other methods of service for notices given strictly pursuant to a lease.[17] If the lease is silent on a method of service, the method used must be "reasonable."

5. Flow Chart of Litigation Regarding Conditional Limitations in Commercial Leases -- Yellowstone

On the next page is a flow chart that visually represents the litigation described in this section regarding conditional limitations in commercial leases.

[16] *See Empire State Building Assocs. v. Trump Empire State Partners*, 245 A.D.2d 225 (1st Dept. 1997) (where a tenant can show that it is able and willing to bring itself into compliance with the lease absent vacating the premises, forfeiture is inappropriate); *Garland*, *supra*, at 38.

[17] *See Rose Assoc. v. Bernstein*, 138 Misc.2d 1044 (N.Y.C. Civ.Ct. N.Y. Cty. 1988).



6. Defaults the Tenant Refuses To Cure

If a tenant's position is that it refuses to cure the default, Tenant can't have the *Yellowstone*. In *Linmont Realty, Inc. v. Vitocarl, Inc.*, 147 A.D.2d 618 (2nd Dept. 1989), the *Yellowstone* application was denied. There were 17 defaults, including failure to renew environmental liability insurance, failure to keep daily records of gasoline inventory, failure to have tanks tested, failure to permit the defendants to inspect records of tank tests and inventory control, failure to clean and maintain the premises, and illegally subletting a portion of the premises for the storage and distribution of newspapers. The *Linmont* court reasoned:

> To procure a *Yellowstone* injunction, a commercial tenant must demonstrate, *inter alia,* that it has the desire and ability to cure the alleged default by any means short of vacating the premises. The plaintiff herein has made no offer to cure any of the charged defaults, alleging instead that many of the alleged defaults listed in the Notice of Termination of Lease were not its responsibility, that various conditions did not exist as claimed by the defendants, and that the remainder of the defaults had been waived by the defendants acceptance of rent with knowledge of their existence. [(internal quotation marks and citation omitted)].

G. The Good Guy Guaranty

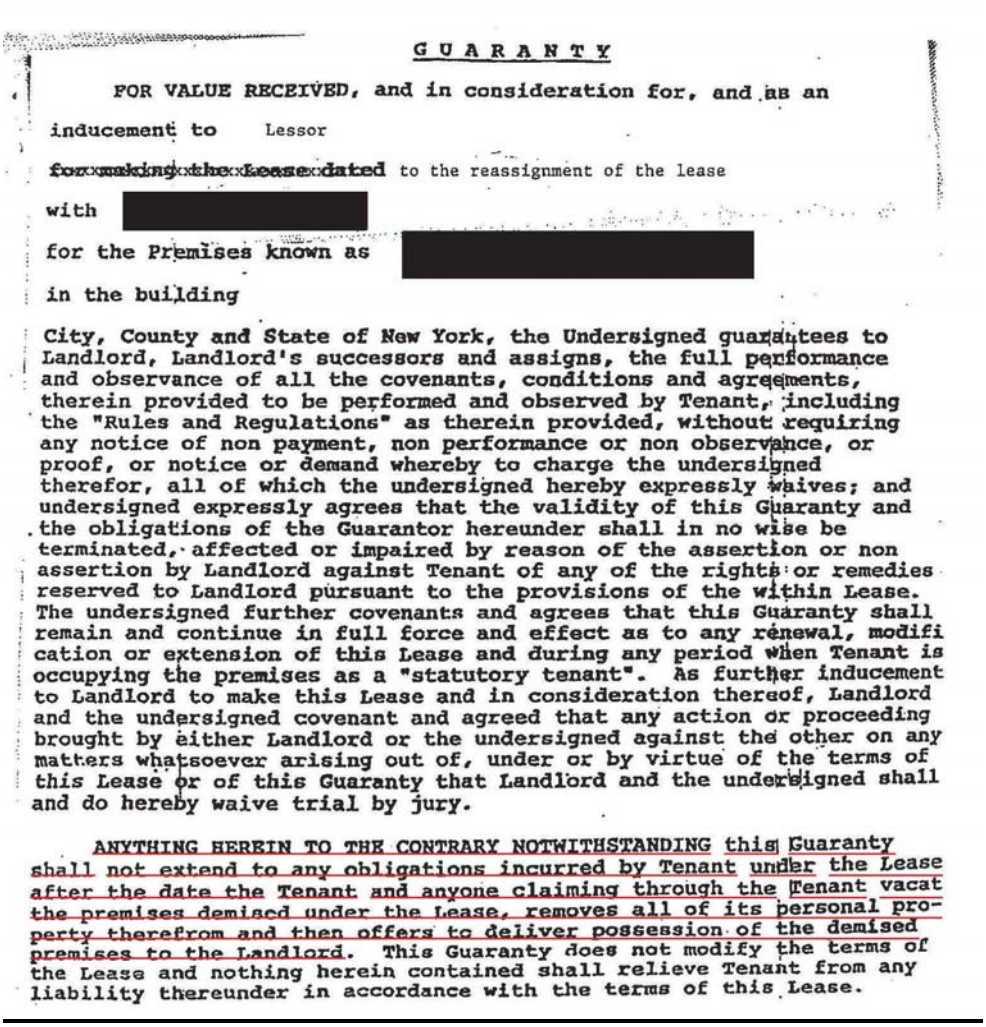
Back to our lease -- There is what seems to be a plain-vanilla good guy guaranty and it was signed (yes, somethings owners and managers give me these things unsigned). It was specifically ratified in ¶ of the First Modification. [18]

1. The Basic Good Guy Guaranty

The simplest and earliest iteration of the GG Guaranty provides that the tenant's principal remains liable for the tenant's obligations under the Lease through the date that the tenant vacates the premises and delivers possession to the Landlord.

[18] Courts construe guaranties strictly in favor of private guarantors. *Levine v. Segal*, 256 A.D.2d 199 (1st Dept. 1998). If a guaranty is silent as to its effect in light of a renewal or other subsequent agreement between the landlord and tenant, courts will not extend the guaranty's enforceability beyond the original agreement. *Trump Management Inc. v. Tuberman*, 163 Misc.2d 921 (Kings Co. Civ. Ct. 1995) *citing Gulf Oil Corp. v Buram Realty Co.*, 11 N.Y. 2d 223 (1962). Where guarantors execute a ratification or reaffirmation of the guaranty and acknowledge their assent to any material changes in the terms of the original contract, courts will hold guarantors liable. *See e.g., North Hill Funding of New York, LLC v. Maiden & Madison Holdings, LLC*, 27 Misc. 3d 1232(A) (N.Y. Sup. Ct. N.Y. Cty. 2010).

EXAMPLE



GUARANTY

FOR VALUE RECEIVED, and in consideration for, and as an inducement to Lessor for ~~making the Lease dated~~ to the reassignment of the lease with [redacted] for the Premises known as [redacted] in the building City, County and State of New York, the Undersigned guarantees to Landlord, Landlord's successors and assigns, the full performance and observance of all the covenants, conditions and agreements, therein provided to be performed and observed by Tenant, including the "Rules and Regulations" as therein provided, without requiring any notice of non payment, non performance or non observance, or proof, or notice or demand whereby to charge the undersigned therefor, all of which the undersigned hereby expressly waives; and undersigned expressly agrees that the validity of this Guaranty and the obligations of the Guarantor hereunder shall in no wise be terminated, affected or impaired by reason of the assertion or non assertion by Landlord against Tenant of any of the rights or remedies reserved to Landlord pursuant to the provisions of the within Lease. The undersigned further covenants and agrees that this Guaranty shall remain and continue in full force and effect as to any renewal, modification or extension of this Lease and during any period when Tenant is occupying the premises as a "statutory tenant". As further inducement to Landlord to make this Lease and in consideration thereof, Landlord and the undersigned covenant and agreed that any action or proceeding brought by either Landlord or the undersigned against the other on any matters whatsoever arising out of, under or by virtue of the terms of this Lease or of this Guaranty that Landlord and the undersigned shall and do hereby waive trial by jury.

ANYTHING HEREIN TO THE CONTRARY NOTWITHSTANDING this Guaranty shall not extend to any obligations incurred by Tenant under the Lease after the date the Tenant and anyone claiming through the Tenant vacat the premises demised under the Lease, removes all of its personal property therefrom and then offers to deliver possession of the demised premises to the Landlord. This Guaranty does not modify the terms of the Lease and nothing herein contained shall relieve Tenant from any liability thereunder in accordance with the terms of this Lease.

The language appears clear and unequivocal. After the tenant, or anyone claiming through the tenant (*i.e.* subtenants), vacates the premises, removes all personal property, and offers to deliver possession to the landlord, the guarantor is in the clear.

However, even this simply phrased guaranty could be simpler. For instance, what does it mean to "offer" to deliver possession? When will "delivery" be complete? What if tenant slides the keys under landlord's office or leaves them with a doorman and landlord does not find out that the keys were returned until weeks after the "delivery"?

What if the tenant surrenders the premises in writing and the landlord accepts the keys without saying a word, only to find out later that tenant has abandoned all of its personal property in the premises? And now the landlord wants to pursue a claim for future rent owed under the lease given tenant's failure to comply with the terms of the guaranty.

If landlord accepts tenant's surrender without reserving its rights under the lease and the guaranty, landlord waives any claims to future rent absent an agreement to the contrary because such acceptance terminates the leasehold.[19]

GG Guaranties are "commonly understood to apply to obligations which accrue *prior to the surrender of the lease premises.*"[20] If there is a basis to hold guarantor personally liable for future rent given tenant's failure to surrender the premises in the manner prescribed by the lease and GG Guaranty, Landlord must reserve all of its rights under the GG Guaranty to pursue those claims against guarantor.[21]

[19] *See Freeman Foursome v. Cabana Carioca*, Index No. 100289/94 (Sup. Ct. N.Y. Cty. Jan. 30, 2001) *aff'd* 293 A.D.2d 964 (1st Dept. 2002) (holding that landlord's failure to reserve rights under the lease and guaranty defeated claim for future rent because acceptance of surrender constitutes termination of the leasehold).

[20] *Russo v. Heller*, 80 A.D.3d 531 (1st Dept. 2011) (emphasis added).

[21] See also *James Leonard 6, Inc. v. Six & Cornelia Associates*, 2016 WL 4094712 (Sup. Ct. NY Cty. 2016) ("The reletting expenses, including rent concessions, and broker's fees occurred after the Plaintiff vacated the Premises and returned the key on May 15, 2015. Defendant does not dispute that Plaintiff returned the keys and vacated the entire premises. Therefore, when [Tenant] vacated the property on May 15, 2015, [Guarantors'] liability for future rent ceased.

2. ***Notice Requirements in Good Guy Guaranty***

EXAMPLE

GUARANTY

In order to induce [redacted], a New York limited liability company, as landlord ("Landlord"), to enter into a lease bearing even date herewith with [redacted] a New York limited liability company, as tenant ("Tenant"), in the form and upon the terms of the lease hereto annexed ("Lease") for premises described as [redacted] ("the "Premises") in the building known as [redacted] having an address at [redacted] ("Guarantor"), hereby represents, guarantees and agrees with Landlord as follows:

(1) Guarantor is a ~~stockholder~~ member of Tenant.

(2) Until the date upon which Tenant delivers possession of the Premises to Landlord, together with the keys to said Premises, vacant (except the Tenant's Improvements), free of all tenancies and occupants (other than Landlord or Landlord's designee pursuant to Article 11 of the Lease), in the condition required pursuant to the terms of the Lease, and confirms its surrender of the Premises pursuant to a (Blumberg form of) surrender agreement via fax whether such delivery of possession and confirmation shall be before or after the occurrence of a default under the Lease, Guarantor hereby guarantees to Landlord:

(a) the payment of any and all costs and expenses, (including, but not limited to, reasonable counsel fees) that are incurred

by Landlord in connection with the enforcement of the terms and provisions of the Lease or the exercising of any remedy thereunder or at law or in equity as against Tenant, or with respect to any action or proceeding by Landlord to obtain or attempt to obtain possession of the Premises; and

(b) the payment of minimum rent as defined in Section 3.01(a) of the Lease, additional rent as set forth in Article 22 of the Lease and any and all sums for which Tenant may be liable under the Lease, and/or for use and occupancy following a termination of the Lease, as the case may be.

(3) This Guaranty is primary, absolute and unconditional, except as herein expressly provided, and shall not be discharged, mitigated, or affected by (i) any modification of the Lease; (ii) any failure of Landlord to enforce any of the provisions of the Lease or by any extension of time or indulgence extended by Landlord to Tenant thereunder; (iii) any defense available to Tenant or Guarantor; or (iv) any invalidity or unenforceability of all or any portion of the Lease; and Guarantor hereby consents to all of the foregoing without notice to Guarantor, and Guarantor's liability shall extend to the Lease as so modified or extended.

The structure of the Example GG Guaranty may seem convoluted but it is, in essence, as simple as the basic GG Guaranty discussed earlier, *i.e.* the guarantor's liability is terminated upon surrender of the premises in the condition required pursuant to the terms of the Lease, plus one additional wrinkle:

> *…and confirms its surrender of the Premises pursuant to a (Blumberg form of) surrender agreement via fax…*

Read in its entirety, ¶ 2 of this guaranty essentially states that the guarantor shall remain liable for the tenant's obligations under the Lease until the date that tenant surrenders the premises in the condition required by the Lease AND confirms the surrender pursuant to a Blumberg form of surrender via fax.

What if Tenant terminates the lease early, surrenders the premises, and confirms the surrender by certified mail? Does the guarantor avoid liability? Technically, no. Terms of a guaranty are strictly construed by the court.[22] Where the guaranty provides for a method of notice, guarantors who fail to comply with such provisions have been held liable for future rent under the lease. *Id.*

Of course, it is worth reiterating that landlord should always expressly reserve its rights under the GG Guaranty at the time of surrender if it hopes to prosecute claims arising from a failure to comply with its terms! See *Freeman Foursome* in a footnote.

Many GG Guaranties require, among a host of other conditions, advance notice of a tenant's intent to terminate the lease early and surrender the premises, in order to terminate the guarantor's liability.[23] The interpretation of the terms of the Good Guy clause are a question of law for the Court, which accords those terms their plain and ordinary meaning.

EXAMPLE

(H) The obligations of Guarantor under this Guaranty shall be limited to the period of time commencing on the date hereof and ending on the date Tenant has surrendered possession of the Premises in vacant and broom clean condition, free of all tenancies and occupants, on the condition that all of the following have occurred (i) at the time of such surrender, all Fixed Annual and Monetary Additional Rental (but not accelerated rent) due under the Lease have been paid to Landlord up to the later of (a) the time of surrender, or (b) the end of the sixty (60) day period set forth in subsection (ii) below, and (ii) Landlord has received at least sixty (60) days written notice from Tenant of Tenant's intent to vacate the Premises and Tenant has vacated the Premises on or before the date for delivery of possession to Landlord set forth by Tenant in such notice, and (iii) Tenant has forfeited to Landlord its Security Deposit under the Lease in the amount set forth in Article 31 of the Lease.

IN WITNESS WHEREOF, Guarantor has duly executed and delivered this Guaranty as of the date first above written.

[22] *Wooster 76 LLC v. Ghatanfard*, 68 A.D.3d 480 (1st Dept. 2009).

[23] See *Fairchild Warehouse Associates, LLC v. Water Chef, Inc.*, 2014 WL 12639275 (Sup. Ct. NY Cty. 2014) ("[Guarantor's] arguments are unavailing in light of the unambiguous language in the Guaranty. The Good Guy clause required tenant give landlord two months notice prior to the vacancy date. Tenant gave landlord less than 30 days notice. The rent was in arrears ($72,000) when tenant vacated the premises. Tenant was given timely Notice of Default to allow a cure of the arrears. Since the defendants have failed to satisfy the relevant conditions of the Good Guy clause, the limitation of liability set forth in the Good Guy clause is unavailable to Lazar. The guarantor is liable for damages for the full term of the lease, as it is undisputed that the conditions in the Good Guy clause were never satisfied [citations omitted].)

In the above example, subsection (ii) lists as one of the required conditions that:

> Landlord has received at least sixty (60) days written notice from Tenant of Tenant's intent to vacate the Premises and Tenant has vacated the Premises on or before the date of delivery of possession to Landlord set forth by Tenant in such notice…

This clause has a dual effect. First, if Tenant fails to give at least 60 days written notice by either giving less than 60 days' notice, OR gives sufficient notice but orally rather than in writing, then the condition is left unsatisfied and guarantor remains liable under the lease for past and future rent owed. Second, the effect of requiring 60 days advance notice of a tenant's intent to surrender the premises functions as an additional two months of security! If the notice period was 180 days, it would an additional 6 months of security. Remember, in a basic GG Guaranty, guarantor's liability is cut off at the time of surrender. Here, the advance notice requirement must be read in conjunction with the surrender provision, subsection (i):

> …at the time of such surrender, all Fixed and Annual and Monetary Additional Rental […] due under the Lease have been paid to Landlord up to the later of (a) the time of surrender, or (b) the end of the (60 day period set forth in subsection (ii) below. . .

By requiring the advance notice and also requiring that all fixed annual and additional rental be paid through the date of surrender or the end of the 60 day period, landlord has effectively tacked on two months that the guarantor will be liable for one way or another. Below are two scenarios to demonstrate how this plays out.

> <u>Scenario 1</u>
>
> Tenant gives 60 days written notice of its intent to surrender. Landlord accepts, reserving its rights under the GG Guaranty. Tenant occupies the premises for the duration of the 60 days and vacates on the 60th day as per the notice. If guarantor wants to walk away from this with no personal liability for all obligations past and future, it must pay the rent due and owing for those two months in addition to any other arrearage.
>
> <u>Scenario 2</u>
>
> Tenant gives 60 days written notice of its intent to surrender. Landlord accepts, reserving its rights under the GG Guaranty, but tells Tenant that it can vacate and surrender even earlier than the 60th day. Any difference in what needs to happen for guarantor to satisfy the termination clause of the GG Guaranty? No! Read the language of subsection (i) carefully. It reads that all Fixed Annual and Monetary Additional Rental due under the lease must be paid

> to Landlord *up to the later of* (a) the time of surrender, or (b) the end of the sixty (60) day period…

One possible downside of drafting a GG Guaranty with an advance notice requirement is that is makes it harder to obtain a summary determination when enforcing a GG Guaranty.[24]

IV. OPTIONS

So back to our story! What options did I give the owner in this gallery case? Here they are, and they are not mutually exclusive, as you will see.

A. OPTION 1 – Rent Demand and Summary Nonpayment Proceeding

Pros: Cheapest (in terms of legal fees) and fastest option.

Cons: If you decided you wanted possession of the space, and Galley pays, then the case is over. No pressure to replenish security.

Time: This is the speediest option.

Costs: This is the least expensive option in terms of legal fees.

Risks: None apparent.

[24] See *Pajeot & Otter LLC v. Westbeth Entertainment LLC*, 2016 WL 6125407 (Sup. Ct. NY Cty 2016) ("Generally, a "good guy" guaranty only holds the guarantor liable for rent and/or additional rent due prior to the tenant's surrender of a commercial premises. In this case, the guarantor also agreed to provide specific notice of its intent to surrender the premises in accordance with the terms of the expired lease… The conflicting allegations regarding, *inter alia*, notice, payment of rent, condition of the premises etc., make this case unworthy of summary judgment.")

B. OPTION 2 – Invoke the Conditional Limitation for Failure to Pay Rent

Pros: More aggressive. Will frighten a tenant who wishes to remain in the space.

Cons: Whenever you send a notice to cure in a commercial case (even for the nonpayment of rent) you invite a *Yellowstone* Injunction. This takes the case out of the realm of a summary proceeding and puts it into a regular plenary action with longer deadlines and discovery. This option also does not stimulate replenishment. This con is not a con if the tenant doesn't do a *Yellowstone.*

Time: Very much slower than Option 1 (if tenant does *Yellowstone*); and slower in any event because there are more predicate steps.

Costs: Much more expensive than Option 1. (if tenant does *Yellowstone*); and more expensive in any event because there are more predicate steps.

Risks: Yellowstone.

C. OPTION 3 – Invoke the Conditional Limitation for Failure to Replenish Security

A "Draw Down Holdover", as I call this procedure, is high art. There are THREE predicate steps before we can bring the holdover proceeding:

(1) I need to send a letter demanding they replenish. Although the ¶ 46(D) says they must replenish "forthwith", Tenant needs to know about the drawdown before it can be expected to replenish. Thus, I typically give tenant a letter telling it that it has one week to replenish. Assuming Tenant does not replenish -

(2) I need to do a 20 day notice to cure as per ¶ 28 of the lease. The failure to replenish forthwith is NOT a rent default, so I need to use the catch all default section at 28(A)(ii). Plus, as per ¶ 34 of the lease they get an extra 3 days for every notice.

(3) Assuming there is no cure, then I do a 5 day notice of termination.

Thereafter, we go to court on a summary holdover proceeding.

Pros: It makes sense to include this with Option 2 if you want to be super aggressive. Will frighten a tenant who wishes to remain in the space.

Cons: Whenever you send a notice to cure in a commercial case (even for the nonpayment of rent) you invite a *Yellowstone* Injunction. This takes the case out of the realm of a summary proceeding and puts it into a regular plenary action with longer deadlines and discovery. This option also does not stimulate replenishment. This con is not a con if the tenant doesn't do a *Yellowstone.*

Time: Very much slower than Option 1 (if tenant does *Yellowstone*); and slower in any event because there are more predicate steps. A little slower than Option 2 because we have the extra predicate layer.

Costs: Much more expensive than Option 1. (if tenant does *Yellowstone*); and more expensive in any event because there are more predicate steps. Probably a bit more expensive than even Option 2 because we have the extra predicate layer.

Risks: Yellowstone.

D. OPTION 4 – Sue under the Good Guy Guaranty

Pros: Very aggressive. As likely to get you paid and the security replenished as anything.

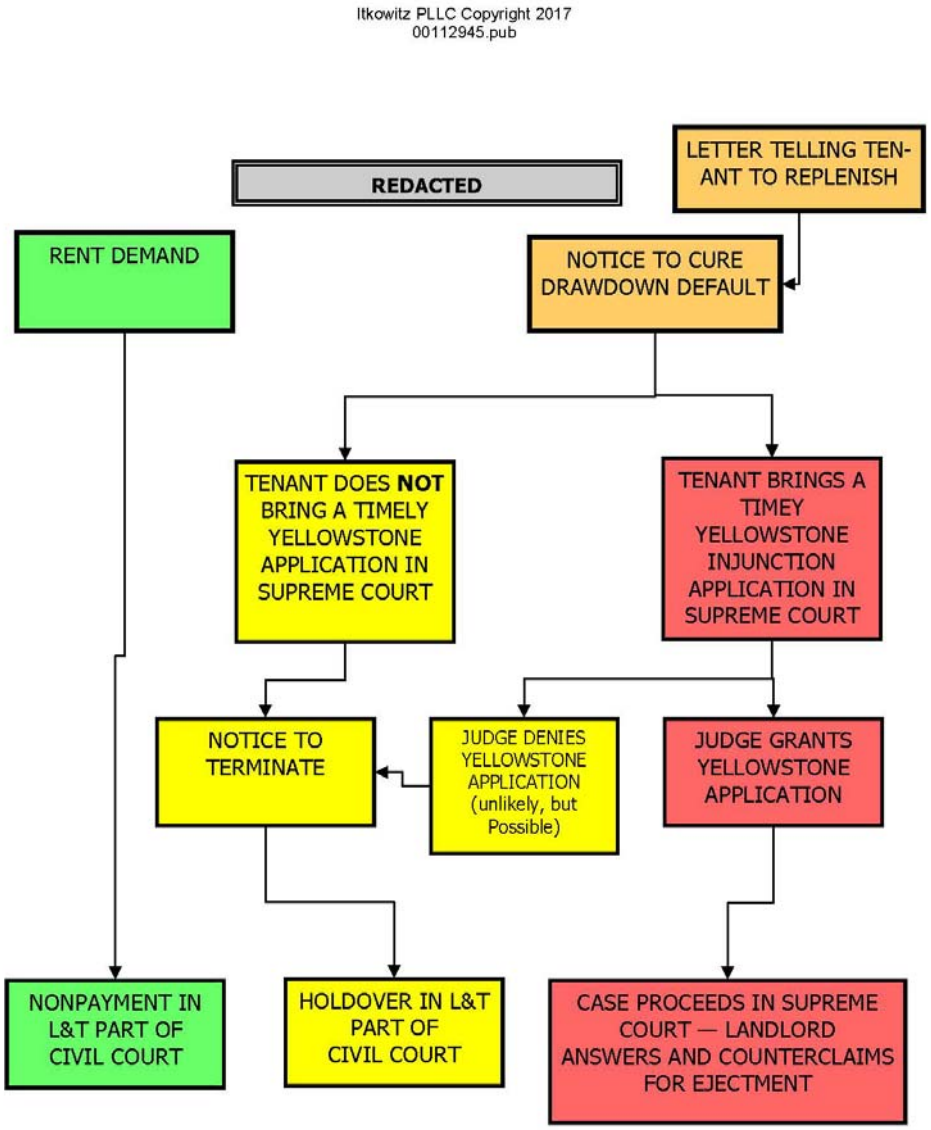
Cons: This does NOTHING to attempt recovery of the space that is not being paid for. This must be done in the context of a regular plenary lawsuit. If the guarantor is broke, it does nothing.

Time: Slower than Option 1.

Costs: Much more expensive than Option 1. Probably cheaper than Options 2 and 3 if they go *Yellowstone*.

Risks: None apparent.

Here is a chart I gave owner to help it with its decision.



V. OWNER MAKES ITS MOVE

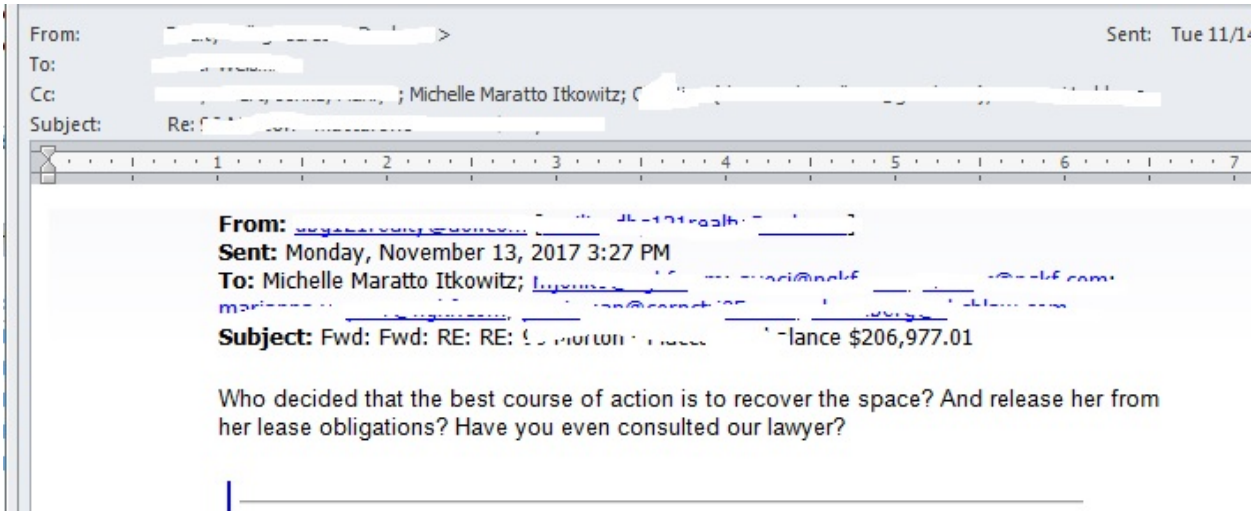
I recommended that the owner avail itself of Option 1 (serve a rent demand) and the very first part of Option 3 (send the letter insisting that tenant replenish). My reasoning behind recommending that owner send the replenishment letter was: (a) it was a low cost move, (b) it preserved that option, (c) it didn't instigate Yellowstone because this was a step BEFORE the notice to cure for failure to replenish.

VI. TENANT MAKES ITS MOVE

In the course of all the contact I ended up having with owner and the managing agent throughout this process, one principal on the chain started writing to me separately, with just me on the chain. He thanked me for my thorough explanations. He also confided in me that he had great respect for the gallery tenant, and that hard times in the gallery's principal's life were forcing the closure, after what had been a long and successful run. The principal was a good man and a good business man. His guess was that this tenant was not going to survive for the last three year of the lease. He was right.

Upon receipt of the letter demanding that it replenish and service of the Rent Demand, tenant informed owner that it would be surrendering by December 31, 2017 and paying the balance of the $92k in arrears, as well as rent for November and December 2017.

Not all partners of the owner were as understanding as the gentleman speaking separately to me. **All of a sudden, a totally new player pops up on the email chain, and had this to say!**


From: [redacted] Sent: Tue 11/14
To: [redacted]
Cc: [redacted]; Michelle Maratto Itkowitz; [redacted]
Subject: Re: [redacted]

From: [redacted]
Sent: Monday, November 13, 2017 3:27 PM
To: Michelle Maratto Itkowitz; [redacted]
Subject: Fwd: Fwd: RE: RE: [redacted] lance $206,977.01

Who decided that the best course of action is to recover the space? And release her from her lease obligations? Have you even consulted our lawyer?

You can't make this stuff up!!! **TO WHICH I SAID:**


From: Michelle Maratto Itkowitz
Sent: Tuesday, November 14, 2017 2:16 PM
To: [redacted] Hochberg
Subject: RE: [redacted] $206,977.01

Um… I *am* your landlord-and-tenant lawyer on this. I served the rent demand and the notice to replenish on the draw down on [redacted]. I am very familiar with the lease and the guaranty.

Here are your options:

(1) The lease goes through 2021. There is no duty to mitigate your damages in New York State. You may sue for the rent, as it becomes due, throughout the balance of the term, minus any rent you do collect from a subsequent tenant. Unfortunately, the remedies (¶ 29)

As I said, you simply can't make this stuff up…in the final section of these materials, you can see my full answer about their options.

VII. LESS OPTIONS, HARD TRUTHS, AND CONCLUSION

I looked for an acceleration clause in the lease; there wasn't one. The guaranty was nothing fancy – tenant didn't have to give notice. That was it. Here were the options I gave owner at this point:

(1) The lease goes through 2021. There is no duty to mitigate your damages in New York State. You may sue for the rent, as it becomes due, throughout the balance of the term, minus any rent you do collect from a subsequent tenant. Unfortunately, the remedies (¶ 29) and damages (¶ 30) provisions of the lease include no acceleration clause, as is typical of most leases. Therefore, you can only sue for the rent as it becomes due. You

will be suing your tenant, however, – REDACTED, LLC – which will likely be quite judgment proof, unless she continues to operate elsewhere using that entity.

(2) REDACTED has a standard good guy guaranty. It was ratified by her upon renewal in March 2012. Unfortunately, the guaranty only covers the period up to when tenant surrenders. This guaranty does not have any further conditions to the cut-off of liability other than the requirement that she surrender. Therefore, if she pays through December and leaves in December, it does not appear that you have any further recourse against REDACTED personally.

And there you have it. A day (or two) in the life of a commercial landlord and tenant litigator.

ABOUT THE AUTHOR

Michelle Maratto Itkowitz is the owner and founder of Itkowitz PLLC and has been practicing landlord and tenant litigation (both complex-residential and commercial) in the City of New York for over twenty years. Michelle represents BOTH landlords and tenants and her core competencies include: Rent Stabilization, the Loft Law, Short-Term Leasing litigations, Yellowstone injunctions, residential tenant representation, Good-Guy Guaranties, clearing buildings so that construction projects can go forward, Rent Stabilization Due Diligence, and co-living.

Michelle publishes and speaks frequently on landlord and tenant law. The groups that Michelle has written for and/or presented to include: The New York State Bar Association, Real Estate Section; Lawline.com; The Columbia Society of Real Estate Appraisers; LandlordsNY; Lorman Education Services; Rossdale CLE, The Association of the Bar of the City of New York; Thompson Reuters; The Cooperator; The New York State Bar Association CLE Publications; The TerraCRG Brooklyn Real Estate Summits; The Association of the Bar of the City of New York; BisNow; and Argo University.

Michelle regularly creates and shares original and useful content on landlord and tenant law, including via booklets, videos, and live presentations. As the “Legal Expert” for LandlordsNY.com, the first social platform exclusively for landlords and property managers, Michelle answers member's questions, guest blogs, and teaches. Michelle developed and regularly updates a seven-part continuing legal education curriculum for Lawline.com entitled "New York Landlord and Tenant Litigation." Over 20,000 lawyers have purchased Michelle’s CLE classes on Lawline.com (a labor of love for which Michelle gets not a dime) and the programs have met with the highest reviews. Michelle is co-authored a chapter on lease remedy clauses and guaranties for the New York State Bar Association, Real Property Section, Commercial Leasing Committee.

Michelle is immensely proud that Itkowitz PLLC was awarded its NYS Women Business Enterprise Certification by the Empire State Development Corp. Michelle’s eponymous law firm is one of the largest women-owned law firms, by revenue, in the State.

Michelle is admitted to practice in New York State and the United States District Court for the Southern District of New York. She received a Bachelor of Arts in Political Science in 1989 from Union College and a Juris Doctor in 1992 from Brooklyn Law School. She began her legal career at Cullen & Dykman.

Contact Michelle anytime, she would be happy to speak to you.

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