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Expert Analysis

Mind the Special Conditions In a Good Guy Guaranty

A Good Guy Guaranty (GG guaranty) is shorthand to describe an agreement between the principal of a corporate tenant and the landlord that holds the principal, typically an individual, personally liable for the corporate tenant's obligations under a lease until the tenant vacates and surrenders the premises. GG Guaranties became popular in the 1980s when commercial landlords—frustrated by tenants who operated rent-free while using technical defenses to forestall eviction proceedings—wanted to discourage such behavior using the specter of personal liability. Since that time, use of the GG Guaranty has evolved and now, the agreements can range from the basic Good Guy described above, to the very complex, where tenant must comply with a host of conditions before surrendering the premises and effectively terminating guarantor's liability.

This article highlights the most troublesome conditions that often trip up commercial tenants and ultimately lead to lawsuits between landlords and guarantors.

The simplest and earliest iteration of the GG guaranty provided that the tenant's principal would remain liable for the tenant's obligations under the lease through the date that the tenant vacated the premises, removed its property, and delivered possession to the landlord. The next iteration required tenant to provide landlord with advance written notice of its intent to terminate the tenancy, in order to relieve the guarantor of liability for future rent under the lease.

Subsequent iterations presented additional hurdles to terminating the GG guaranty by requiring that all rent and other charges be paid through the date of surrender and that the premises be surrendered free from liens and encumbrances. Each of these conditions, while seemingly straightforward, can precipitate nightmare scenarios for commercial tenants and guarantors who are typically locked into long-term leases that are frequently modified or amended to accommodate the prevailing economic climate. Thus, it behooves tenant's counsel to be prepared to unravel a complex relationship that could implicate one or more of the above issues to varying degrees.

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The Basic Good Guy

Even in its most basic form, where guarantor is released upon surrender of the premises, tenants can run into issues if the guaranty contains language requiring that the premises must be surrendered "in the same condition required under the lease." This reference back to the lease implicates the lease's surrender provision which, in the Real Estate Board of New York's Standard Form of Store Lease (standard board lease), is Article 21, requiring the premises to be surrendered in "good order and condition, ordinary wear excepted," and requires tenant to remove its "property."[1]

> Just because the guarantor signed a guaranty, it does not ipso facto make it liable for all of tenant's obligations.

Because "good order and condition" is necessarily a fact-sensitive standard, the tenant will not have much guidance on what the threshold for a default will be. It is advisable that the lease include a walk-through provision prior to the time of surrender that requires the parties to jointly inspect the premises and, at least begin a dialogue regarding any potential damages to the premises. On the other hand, if landlord hopes to hold the guarantor responsible for damages to the premises or future rent after a tenant's surrender, it must reserve its rights under the lease and the guaranty at the time of surrender or risk waiving the guaranty entirely.[2]

The requirement that tenant remove its "property" prior to surrender also implicates the standard board lease, specifically, Article 3 which confers on the landlord, a right to relinquish title to any fixtures or alterations to the premises and requires the tenant to remove such property at tenant's cost.[3] If landlord relinquishes title, the tenant must remove this property or risk keeping guarantor on the hook for all future rent and cost of removal. Tenant's counsel would be well advised to negotiate that this provision be stricken altogether from the lease because often, the cost of removal of installations is more expensive than the installation itself.

Advance Notice Provisions

Requiring the tenant to provide written notice of its intention to terminate the tenancy, typically between 60 and 180 days in advance of the surrender date, can have a dual effect. First, if tenant fails to timely comply with the notice provision, or gives timely 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, if this requirement is paired with the requirement that all rent and other charges be paid up until the date of surrender, then guarantor cannot terminate its liability without paying rent during the notice period which amounts to anywhere from two to six months of additional security.

On the other hand, landlords who hope to enforce the guaranty should be very careful when acknowledging a tenant's tender of notice of its intention to prematurely terminate and surrender the leasehold. Any language that may be construed as landlord acknowledging that the notice satisfies the guaranty's requirements may have the effect of releasing the guarantor entirely irrespective of the landlord's intent and even if, at the time of surrender, the tenant remains in default of past-due rent. See *Chimart Associates v. Paul*, 66 N.Y.2d 570 (1986) ("matters extrinsic to the document may not be considered when the intent of the parties can be gleaned from the face of the document") quoting *Teitelbaum Holdings v. Gold*, 48 N.Y.2d 51, 56 (1979).

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Liens and Encumbrances

A commercial lease will often provide for the tenant to make alterations, installations, or otherwise build out the premises to suit its business purposes. These installations may require subsequent repairs and maintenance which, pursuant to the lease, are typically the sole responsibility of the tenant. If the tenant retains a contractor to perform such work and fails to make full payment, the contractor can file a mechanics' lien against the property with the county clerk's office to perfect a security interest in the premises for the outstanding balance.

The property can also become encumbered by UCC liens, i.e., liens filed in connection with equipment or merchandise pursuant to the Uniform Commercial Code. Unlike mechanics' liens, UCC liens are typically concerned with movable goods arising from tenant's business as opposed to fixtures or alterations to the premises that may become the property of the landlord pursuant to the lease. However, even in the case of UCC liens, the lienor, i.e., the filing party, may word the lien in vague or overbroad terms so as to implicate fixtures and place a cloud over the title to the premise.

Whether the lien is a mechanics' lien or a UCC lien, if the guaranty requires that the premises be surrendered "free of all liens and encumbrances," tenant's counsel should perform a thorough inquiry into any potential claims against the premises, notify landlord of same, and resolve any liens that tenant may be answerable for before seeking to terminate the guaranty. Failing to do so could wind up leaving guarantor on the hook for the lien amount and future rent.

Rent Abatement Provisions

A commercial lease will often include incentives such as rent reductions or months of free rent to encourage tenants to stay in good standing and remain current on payments. If a tenant fails to remain current or is in breach of a nonmonetary obligation under the lease, this may trigger language in rent abatement provisions that, in effect, revokes the rent concession and makes the concession amount due as outstanding rent. For example, consider the following language:

> Tenant acknowledges that the consideration for the aforesaid abatement of minimum rent is Tenant's agreement to perform all of the terms, covenants and conditions of this Lease on its part to be performed. Therefore, if Tenant shall be in default under any of the terms, covenants and conditions at any time, during the term hereof, the aggregate amount of all minimum rent that was abated shall immediately thereafter become due and payable by Tenant to Landlord.

Assume that the tenant becomes unable to carry the lease to its full term and is forced to surrender. This would constitute a breach of the lease that triggers the clawback language of the above provision and the total amount in rent concession would become immediately due and payable by tenant to landlord.

Assuming that the guaranty's termination clause requires all rent and additional rent to be paid through the date of surrender in order to cut off guarantor's liability, the guaranty will remain in effect and keep guarantor on the hook for all future rent for the remaining term in addition to the rent concession amount if the tenant does not pay this amount before vacating.

Renewals and Modifications

Just because the guarantor signed a guaranty, it does not ipso facto make it liable for all of tenant's obligations. Assume, for example, that the clawback provision excerpted above in the previous section appears in a lease renewal that postdates the guaranty and applies to the new term. In this case, if the guaranty's language does not address whether it survives a subsequent agreement between the parties, a court may not enforce its terms in connection with tenant's obligations under the new agreement.

> 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.

Courts construe guaranties strictly in favor of private guarantors.[4] 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.[5]

To account for such a contingency, many guaranties will contain language stating that the guaranty "shall remain and continue in full force and effect as to any renewal, change or extension of the Lease." Whether this language can successfully extend the guaranty to apply to the terms of a renewal, extension or modification depends on how the subsequent agreement is worded and what its terms are.

For example, if the subsequent agreement refers to the lease as "expired," then a court will give the language effect and find that the guaranty terminated with the expiration of the underlying lease.[6] Or, if the subsequent agreement materially alters a term of the original lease by increasing or decreasing rent without contemporaneous proof of the guarantor's consent, the survival language in the guaranty will not hold the guarantor liable for the new terms.[7]

Therefore, in the above scenario where landlord and tenant execute a lease renewal that offers a rent concession, a court may find this to be a material alteration of the original lease (i.e., change in overall rent) and refuse to enforce the guaranty.

To avoid these pitfalls, it is always best practice when entering into a subsequent agreement such as a lease renewal, amendment, or extension, to have the guarantor execute a ratification of the original guaranty, acknowledging the assumption of tenant's liability for all the new terms agreed upon.

Conclusion

Evaluating the evolution of the GG guaranty, it becomes clear that, over time, landlords were interested in making it as difficult as possible for the guarantor to terminate its liability by conditioning such termination on the satisfaction of a variety of conditions that cast uncertainty over the tenant's standing vis-à-vis the lease. Tenants and guarantors, on the other hand, desire certainty and want to hand over the keys without any further concern. Thus, tenant's counsel should anticipate these issues as early as the time that the lease is being negotiated so as to limit the number of hurdles a tenant has to clear before terminating the guaranty.

1. Reference to the Standard Board Lease is made by way of example.

2. 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); *Russo v. Heller*, 80 A.D.3d 531, 531 (1st Dept. 2011) (good guy guaranties are "commonly understood to apply to obligations which accrue prior to the surrender of the lease premises").

3. Article 3 reads:

> All fixtures and all paneling, partitions, railings and like installations, installed in the premises at any time, either by Tenant or by Owner on Tenant's behalf, shall, upon installation, become the property of Owner and shall remain upon and be surrendered with the demised premises unless Owner, by notice to Tenant no later than twenty days prior to the date fixed as termination of the lease, elects to relinquish Owner's rights thereto and to have them removed by Tenant, in which event, the same shall be removed from the premises by Tenant prior to the expiration of the lease, at Tenant's expense. Nothing in this article shall be construed to give Owner title to, or to prevent Tenant's removal of, trade fixtures, moveable office furniture and equipment, but upon removal of same from the demised premises or upon removal of other installations as may be required by Owner, Tenant shall immediately and at its expense, repair and restore the demised premises to the condition existing prior to any such installations, and repair any damage to the demised premises or the building due to such removal. All property permitted or required to be removed by Tenant at the end of the term remaining in the demised premises after Tenant's removal shall be deemed abandoned and may, at the election of Owner, either be retained as Owner's property or may be removed from the demised premises by Owner at Tenant's expense.

Standard Board Lease, Art. 3.

4. *Levine v. Segal*, 256 A.D.2d 199, 200 (1st Dept. 1998).

5. *Trump Management v. Tuberman*, 163 Misc.2d 921 (Kings Co. Civ. Ct. 1995) citing *Gulf Oil v. Buram Realty*, 11 N.Y. 2d 223 (1962).

6. *Lo-Ho v. Batista*, 62 A.D.3d 558 (1st Dept. 2009).

7. Id; *Arlona Partnership v. The 8th of January*, 50 A.D.3d 933 (2d. Dept. 2008).