

Hey, Hey . . . Ho, Ho, Sometimes You Just Have To Let Them Go: Reasonableness in Dealing with Lease Assignment Requests

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So...your lease prohibits its assignment or transfer without the landlord's prior written consent, [wait for it...] which consent shall not be unreasonably withheld or delayed. Tenant decides to assign the lease to Widget Warehouse, which coincidentally happens to also be in negotiations with the landlord for a different space at the same property. Tenant calls landlord and asks for its written consent to assign the lease, to which the landlord immediately says "No" and hangs up the phone. Has the landlord been reasonable in withholding consent? What if the tenant had instead been a well-known doughnut retailer franchisee looking to sublet the premises to Hometown Bakery, a start-up bakery proposed by the former employee of a local bakery that recently went out of business?

Here, the reasonableness standard applies because it is expressly stated in the lease. It is also common for courts to imply a reasonableness standard based on the general requirement that parties in a landlord-tenant relationship deal with one another in good faith. As such, all but the most obvious of assignment or sublease situations require a careful analysis of what would constitute an unreasonable refusal to consent to the proposed assignment or sublet.

There are numerous reasons why a landlord may reasonably withhold consent to a proposed assignment or sublease. For instance, a landlord could withhold consent if the consent would violate a current tenant exclusive right. A landlord may also want to prevent a revenue loss because of a percentage rent provision or maintain commercial objectives for the property, such as having a certain mix of tenants. These are all common bases for withholding consent. However, there are many other rationales given for withholding consent to an assignment that are not as clear cut. For example, what if the Landlord withholds consent to an assignment because it wants to avoid competition for an existing tenant even though no exclusivity rights exist for that tenant? Is the potential souring of a relationship between the landlord and existing tenant sufficient grounds to reasonably withhold consent to the assignment/sublet?

A key element for the landlord to satisfy the reasonableness standard is to evaluate information about the proposed transfer, and quantify the reasons for withholding consent. If a landlord does decide to withhold consent, it should articulate the reasons for refusal to establish the reasonableness of its conclusion, thereby circumventing arguments that it acted arbitrarily. Accordingly, our landlord in the Widget Warehouse scenario risks a claim of unreasonableness by seemingly dismissing the assignment request out of hand.

The landlord is not the only one with work to do when a tenant makes an assignment request. It is the tenant's obligation to provide sufficient information for the landlord to consider the assignment or sublease request. In this regard, the tenant in our Widget Warehouse example should have presented sufficient information to landlord to advise it about the requested assignment, rather than simply making the request for written consent over the phone.

Information shared with landlord should cover the areas of concern for the landlord based on the lease. For instance, if the lease has a percentage rent provision, tenant should provide information so that landlord is able to evaluate the impact on revenue if consent is given. When making an assignment request, tenant should also provide landlord adequate time to consider the request. A lack of sufficient time will undercut an argument that landlord acted unreasonably in evaluating the request.

When negotiating a lease, the parties should give careful consideration to whether the reasonableness standard should be more clearly articulated. The assignment provisions can be drafted to limit areas of dispute by defining circumstances under which assignments are permitted or prohibited. Rather than providing no direction beyond mere "reasonableness", the assignment provision could specify that assignments to a substantially similar business, or one dealing in similar merchandise or services would not be subject to Landlord consent.

In the Hometown Baker scenario, the Lease could have been negotiated to include certain economic factors or experience in the industry that would be considered. While including specific criteria will not resolve all possible conflicts, the inclusion of that type of criteria could provide invaluable guidance to the parties during the process.

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