

To Represent or Not to Represent: That is the Question

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Practice Area: Retail Real Estate

Negotiating a lease extension or renewal will often present unique legal issues that are not encountered when negotiating a lease for a new site. For example, a landlord will often include language in a lease extension agreement or lease amendment whereby the tenant is asked to make certain representations and warranties to the landlord regarding the existence of defaults by, and claims against, the landlord and other specified matters. For example:

Representations and Warranties. As an inducement for Landlord to enter into this Amendment, Tenant hereby represents, warrants and agrees that, as of the date hereof: (a) there exists no breach, default or event of default by Landlord under the Lease; (b) all prior tenant improvement work required to be performed by Landlord in the Premises or tenant improvement allowances have been completed and/or funded; (c) there exists no breach, default or event of default by Tenant under the Lease and the Lease continues to be a legal, valid and binding agreement and obligation of Tenant; and (d) Tenant does not have any current offset or defense to its performance or obligations under the Lease.

While it might be tempting to gloss over a clause like this as just more legal "mumbo jumbo," this language has potentially serious consequences for the tenant. The example above includes representations and warranties of the type often requested of a tenant in an estoppel certificate. Faced with such a clause, the tenant must be prepared to perform the same type of due diligence and investigation that would be required in connection with preparing and delivering an estoppel certificate.

By ignoring this type of estoppel language and allowing it to remain in the amendment, the tenant could be inadvertently waiving its right to recoup an outstanding tenant improvement allowance or the right to pursue its legal remedies for landlord's breach of the lease.

The prudent thing for a tenant to do when faced with this sort of estoppel-like provision is to insist that it be removed from the amendment prior to execution. Alternatively, the parties could agree that tenant is to provide a formal estoppel certificate in lieu of the representation in the amendment. If the parties are unable to agree on a compromise and landlord insists on including the estoppel-like language, then it is incumbent on the tenant to perform all necessary due diligence and consult the appropriate personnel – accounting, lease compliance, construction, and legal – before making these types of representations or warranties to the landlord. For example, tenant should confirm that:

1. tenant does not have any rent offsets for items such as tenant self-help rights or operating expense reconciliations,
2. all tenant improvement work has been fully and satisfactorily completed,
3. all tenant improvement allowances due from landlord have been received,
4. there are no repairs or maintenance needed in tenant's space which are the responsibility of the landlord, and
5. tenant is not aware of any other potential landlord defaults.

Tenant should not commit to estoppel-like representations and warranties unless it can confirm the veracity of each one. It is critical that tenants have processes in place to properly vet and respond to this language when it is included in a lease extension or renewal by a landlord. Such internal efforts will prevent the inadvertent waiver of rights or potential remedies against the landlord.

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