



Interpreting Options to Extend in Commercial Leases

■ By Robert C. Wallace, Partner, Stuart Kane LLP

Disputes frequently arise between landlords and business tenants concerning lease renewal options in commercial leases in California. Two recent cases illustrate the need to make certain that options to extend are clearly understood.

Perpetual Options To Renew Are Disfavored

In a 2012 case *Ginsberg v. Gamson*, the tenant and landlord entered into a commercial retail lease for a five-year term, with an option to renew for successive “additional five-year periods” without limiting the number of those renewals. During the second term, a dispute arose over repairs and the tenant sued, alleging breach of the lease and intentional interference with its use of the premises.

The landlord filed a cross-complaint seeking a declaration that the lease allowed only one renewal. The trial court construed the lease to give the tenant the right to unlimited five-year extensions for 99 years. The jury subsequently found in favor of the tenant and awarded it damages. The landlord appealed. The court of appeal reversed the trial court’s ruling, concluding that the lease could not be construed to allow unlimited extensions and instead gave the tenant the right to only one extension period. The tenant, who relied upon a 25 or 30 year lease, could be ousted after ten years.

In its ruling, the court of appeal noted that in California, a “general” covenant to renew, *i.e.*, one that does not contain clear and explicit language, will be construed as providing only a single renewal. For example, a renewal provision stating the lease may be renewed from “year to year” or for “successive” periods does not clearly indicate an intent to provide perpetual renewals, and is likely to support only a single extension.

This case demonstrates the quandary a tenant faces when the landlord refuses to make repairs required under the lease, perhaps to coerce the tenant to vacate. This tenant elected to stay and push back based on her belief that the lease gave her unlimited options to renew on favorable terms. The tenant’s choice to remain in possession also destroyed her wrongful eviction claim. In California a tenant generally cannot claim eviction unless she leaves in reaction to the landlord’s provocation.

All Co-Tenants Must Timely Exercise an Option to Extend

In *Jeffrey Kavin, Inc. v. Frye* (2012), the landlord, Kavin, entered into a commercial retail lease for

a dress shop with four individuals, two of whom operated the dress shop, and two who had better credit. The initial term of the lease was for three years and contained a three-year option to extend the term if the tenants delivered to the landlord written notice to exercise such option at least six months before the end of the initial term; otherwise the option would automatically expire.

Approximately two weeks after the option period expired, the landlord advised tenant Frye that the tenants failed to timely exercise the option to extend. Frye told the landlord that the tenants wanted to extend, and the landlord delivered to Frye a document exercising the option to be signed only by Frye, advising Frye to leave the document undated. When Frye vacated the premises a few months later, the landlord sued all four tenants for breach of the lease, as extended pursuant to the option.

The trial and appellate courts ruled in favor of the tenants, because the tenants did not strictly comply with the terms of the lease requiring timely written notice to exercise the option to renew, and therefore the option expired. The court rejected the landlord’s contention that he had waived the notice requirement, finding that a party to a contract may only waive a contract provision when the provision is for that party’s benefit. Here, the requirement of timely written notice benefited the landlord *and* the other tenants, particularly the two creditworthy tenants “guaranteeing” the lease. Thus, the landlord could not unilaterally waive the notice requirement. The appeals court also found that even if the renewal option had been timely exercised, Frye did not have the requisite authority to bind her co-tenants.

This case is a warning to landlords not to rely on their unilateral waiver of a required time limit to exercise an option when the time limit benefits both the landlord and the tenant(s). Landlords should also ensure each co-tenant and guarantor signs the exercise of the option, or have written authorization that the co-tenants and guarantors who did not sign gave the signing co tenant the authority to act on their behalf. A clause along those lines in the lease or option could prove beneficial. ■



ROBERT WALLACE

Robert Wallace is a real estate partner with Stuart Kane LLP. His experience includes all aspects of commercial real estate transactions, including real property acquisitions and dispositions, development, financing, construction, and leasing. Mr. Wallace’s expertise includes retail, office, and industrial leasing, construction contracts, and real estate litigation.

Stuart Kane LLP is a law firm suited to a changing legal world — committed to delivering efficient, responsive, focused and specialized legal representation in the areas of real estate, employment and litigation.

www.stuartkane.com

Stuart Kane paid for this space and is solely responsible for its content.

