

PUBLICATION

A Landlord's Guide to Sublease Consents: There's More to It Than "Yes" or "No" [Ober|Kaler]

Authors: Robert E. Scher

September 23, 2014

When a tenant asks its landlord to consent to a sublease the Landlord will rightly focus first on business concerns. Who is the subtenant? What is its financial condition? What will it do in the leased premises? Will it fit in with the building's tenant mix? Assuming, however, that the landlord is favorably disposed to consent, then the landlord should direct its attention to the numerous legal issues presented by the sublease. These legal issues are typically not addressed in what is often a very short Consent document that the tenant and subtenant ask the landlord to execute. Indeed, the proposed Consent may consist of a single sentence. It is at this point, however, that the landlord has an opportunity to protect its interests by modifying the Consent or by requiring that the parties use the landlord's form of Consent.

The landlord can use the Consent to address three areas of concern: confirmation of pertinent facts, confirmation of the legal relationship of the parties and definition of the rights and obligations of the parties in the soon to be tri-party relationship. A landlord typically confirms pertinent facts by requiring the tenant and the subtenant to make various representations and warranties. Some of these representations and warranties should be made by both the tenant and the subtenant. For instance, both should represent and warrant that they have provided the landlord with a true, correct and complete copy of the sublease agreement. Both should also represent and warrant that the subtenant is not paying any rent or giving any other thing of value to the tenant, except as expressly set forth in the sublease. This is especially important to a landlord if the prime lease provides that the landlord is entitled to all or a portion of any subrent received by the tenant in excess of the rent that the tenant is required to pay under the prime lease.

Other representations and warranties should be made by the tenant or the subtenant alone. The subtenant should represent and warrant that the financial statements which the landlord relied upon to grant its consent are accurate and fairly present the financial condition of the subtenant as of the date of the statements. Similarly, if there is any other information provided by the subtenant upon which the landlord relied, this additional information should be the subject of a representation and warranty. As for the tenant, the landlord may want representations and warranties similar to those found in a tenant estoppel certificate. For instance, the landlord may want the tenant to represent and warrant that the landlord is in compliance with the terms of the lease; that the tenant has not sublet, assigned or encumbered the prime lease or the leased premises; and that the tenant has no defenses or offsets to its obligations under the lease.

Both the tenant and the subtenant should provide the landlord with confirmation of the basic legal relationship that will exist among the parties after the sublease is in place. This is the landlord's opportunity to confirm matters such as: that the sublease is subject and subordinate to the prime lease; that any acts or omissions of the subtenant which violate the prime lease are deemed a violation by the tenant of the prime lease; that neither the Consent nor the sublease will be construed to modify the prime lease or to alter the rights or obligations of the landlord or the tenant under the prime lease; that the landlord is not bound by any of the terms of the sublease; that the subtenant cannot enforce any of the terms of the prime lease against the landlord; and that the tenant is not released from any of its obligations under the prime lease.

Beyond these confirmatory provisions, the request for consent is the landlord's opportunity to shape the contours of the tri-party relationship that will exist when the sublease becomes effective. Unlike some of the confirmatory provisions mentioned above, which are designed to reaffirm rules operative at common law, these provisions need to be stated in the Consent, as covenants, in order to be applicable.

While there are any number of covenants that a landlord may want to include in a Consent, some of the more significant are the following: the subtenant may not further sublease the subleased premises or assign its interest in the sublease without the Landlord's consent (these restrictions may or may not be necessary depending upon the language of the assignment/sublease clause in the prime lease); the tenant and subtenant may not amend the sublease without the landlord's prior written consent; if any notice of default is given by either the tenant to the subtenant or vice versa, the landlord will be provided with a simultaneous copy of the notice; the subtenant must provide financial information or estoppel certificates upon the landlord's request; and the subtenant agrees to stipulated insurance, waiver of right of recovery or indemnity provisions (e.g., the landlord may require the subtenant to carry liability insurance naming the landlord and others as additional insureds).

Perhaps, the most significant issues that such covenants should address involve the relationship between the landlord and the subtenant in the event the tenant defaults under the prime lease. Absent specific covenants regarding these issues, a termination of the prime lease resulting from a tenant default would automatically extinguish the sublease. The subtenant would have no right to remain in the subleased premises and the landlord would have no right to collect subrent from the subtenant. Ideally, the landlord would like the right to collect subrent from the subtenant after default and the right, at the landlord's election, after termination of the prime lease, to require the subtenant to attorn to the landlord under the executory provisions of the sublease.

The landlord's right to collect subrent is usually implemented by requiring: that the tenant assign to the landlord its right to receive subrent from the subtenant (subject to a license allowing the tenant to retain the subrent until a default under the prime lease); that the tenant instruct the subtenant that in the event of default under the prime lease the subtenant pay its subrent directly to the landlord; and (iii) that the subtenant acknowledge that payment of any such subrent does not create a direct lease between the subtenant and the landlord. The tenant should also acknowledge that the landlord's acceptance of the subrents does not constitute a waiver by the landlord of any of its rights under the lease against the tenant.

If these provisions are inserted in the Consent, then upon a tenant default under the prime lease the Landlord can exercise its right to collect subrents from the subtenant, at least so long as the Landlord does not terminate the prime lease. But, if the landlord does terminate the prime lease, the sublease would be extinguished and there would be no subrent due from the subtenant. Therefore, if the landlord would want to continue receiving the subrent or for other reasons would want the subtenant to remain in possession after a termination of the prime lease (e.g. to avoid having a vacant building) the landlord must include additional language in the Consent. This additional language would provide that upon termination of the prime lease and dispossession of the tenant, the landlord will succeed to all of the tenant's right, title and interest in the sublease and would require that the subtenant attorn to the landlord under the executory provisions of the sublease. In other words, the landlord could require that upon termination of the prime lease the subtenant would enter into a direct contractual relationship with the landlord, on the terms of the sublease. In some cases, the subtenant would want this result as well. On the other hand, in some cases, the landlord may not want the subtenant to attorn, but would rather have the sublease terminate if the prime lease terminates (e.g., if the prime lease is for a large amount of space and the sublease is for a small portion of that space in a central location). Therefore, the landlord would want the Consent to provide that the subtenant's obligation to attorn is not automatic, but is at the landlord's option.

Beyond giving the landlord the option to require attornment, the Consent should also provide that if the subtenant does attorn, that the attornment is subject to certain conditions and limitations necessary to protect the landlord. The most common of these are that the landlord is not liable for any previous acts or omissions of the tenant, that the landlord is not bound by any subrent paid more than one month in advance, that the landlord is not bound by any amendment to the sublease made without the landlord's prior written consent, that the landlord is not subject to any offsets or defenses the subtenant would have against the tenant and that the landlord is not obligated to complete any construction for the subtenant or pay any improvement allowance. Depending upon the relative bargaining position of the landlord and the subtenant the attornment provision of the Consent may be the subject of considerable negotiation.

For a variety of reasons, a landlord may not want to turn every request to consent to a sublease into a full fledged negotiation of a complicated Consent. But, the landlord should understand what pitfalls and opportunities will be presented by the tri-party relationship to be created by the sublease. Once the landlord is aware of these issues it can decide which are important and should be included in the Consent and which do not rise to that level. Experienced legal representation can help the landlord make this determination.

This article was also published in *citybizlist* and *Law 360*.