Considerations For Artists When Negotiating Commercial Leases

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This article is for informational purposes only and should not be construed as legal advice. For your specific issues, it is always best to consult with an attorney.

A commercial lease is a legally binding contract. As such, a party entering into a lease should be well informed. The points below provide some helpful information for the wary artist when negotiating a commercial lease.

Financial Obligations and Economic Considerations

It is important to know and assess your financial limitations when negotiating a lease, including not only knowing your own financial obligations and duties as a tenant under the proposed lease, but also those of the landlord. There are typically two types of commercial leases: a gross lease or a net lease. In a gross commercial lease, the tenant is responsible for base rent while the landlord pays such additional costs as real estate taxes, insurance, and common area maintenance charges (CAM). With respect to net leases, the more common of the two, the tenant is not only responsible for the base rent payment, but also additional rent payments, inclusive of CAM, insurance, real estate taxes, and utilities. Before signing a lease, make sure you factor in these additional payments, as they are additional rent and payable along with the base rent.

Tailor the Length of the Lease to Fit Your Business Needs

Because of the standard five to ten-year commitment associated with commercial leases, it is important to assess your own financial situation and business needs before signing. Some of the benefits of long-term leases include the ability to anticipate rent over the next few years and to avoid market rate rental increases.

- In order to maximize your opportunities, look to whether subletting the space or assigning the lease to a third party is an option; however, be mindful when negotiating these provisions as they are usually at the landlord’s discretion.
- The negotiation of an escape clause allowing the tenant to terminate the lease after a notice in writing may be a viable option.
- Be wary of short-term leases, or month-to-month tenancy, as they may be an indicator of the landlord’s desire to sell the property and lead to lease termination at inopportune times that may cause business disruption and/or disturb financial gain.¹
- If possible, know your landlord’s intentions regarding renewals, rent increases and other matters concerning the space.

Promises of lease extensions and/or other concessions are not binding; all material terms of the lease should be in writing.

In contrast, a short-term lease may be desirable for artists looking to showcase their work on a temporary basis in a location that would otherwise not be an affordable option. Pop-ups are creative and resourceful short-term solutions to urban space that would otherwise remain unused. The advantage of pop-ups, such as those advertised by Made in the Lower East Side (miLES)\textsuperscript{2}, is that they may come equipped with basic utilities and other functional necessities for operating a business, including wi-fi, bathrooms, a stereo system and air-conditioning.

Disadvantages of short-term leasing include the need to negotiate a new lease contract at the end of the lease term, which is subject to rental increases. Negotiate renewal clauses in the event that you would like to stay.

\textbf{Read the Lease for Hidden costs}

Base rent is generally quoted in terms of annual rent per square foot and is frequently subject to annual percentage increases. Additional rent payments, such as insurance and real estate taxes, may be subject to fluctuations.

- If negotiating a long-term lease, be wary of the annual increases of rent, which are subject to incremental changes in base per rentable square foot.
- Any conditions and expectations of the tenant should be clearly defined in the lease.
- In the event you are required to pay real estate taxes, verify that your pro rata share is in proportion to the square footage of the space that you are renting.
- Be aware of whether the property is subject to rent abatement and whether it is subject to be reassessed at some point during the lease, leading to accelerated increases in property tax during the tenancy of the lease.

\textbf{Avoid Personal Liability}

An artist should never sign a lease under his or her own individual name; rather, he or she should form a limited liability company or corporation to shield him or herself from personal liability.

- A brief consultation with an attorney may be necessary to determine which entity formation best suits your needs as certain tax and business obligations accompany the formation of entities.

Some landlords, as an extra measure of security, will require that the tenant sign a personal guarantee in which the guarantor promises to satisfy certain debts and obligations under the lease in the event of default.

\textsuperscript{2} \url{http://www.miles.city/}.\hfill
• Be careful when signing such guarantees, as they could potentially render the guarantor liable for certain financial obligations, including additional rent and other expenses for the remainder of the lease term.

If possible, try to negotiate a “good-guy” guarantee, a type of limited personal guarantee, to ensure that there is an ability to terminate the lease in the event of a default. With such guarantees, the tenant may be able to terminate the lease provided the tenant meets certain criteria, including giving appropriate notice to the landlord to vacate the premises, paying all rent and other additional charges due from the “notice to vacate” date, and delivering the premises in “broom clean” condition.

**Ensure Against the Reversion of Personal Property to Landlord[^3]**

An artist may think that any customization by the tenant of the commercial space and the contents within would automatically revert to the tenant upon the surrender of the premises. However, some leases contain provisions that may limit and/or hinder that assumed right.

• In some leases, for example, any fixtures, attachments or appendages to the interior structure, or installations that the artist creates during the tenancy of the lease may, in fact, be the property of the landlord upon the tenant’s surrender of the premises.

Additionally, landlords may try to introduce protective language that serves to create a security interest in the tenants’ goods, enforceable under Article 9 of the Uniform Commercial Code. In such cases, the tenant would grant the landlord a security interest in collateral, items including personal property, furniture, fixtures, inventory and equipment located in the premises, in the event the tenant fails to fulfill his or her obligations under the lease.

• Such provisions are worrisome for artists because certain language could describe the collateral broadly enough to include personal and tangible property used in the tenant’s conduct of business. Accordingly, the landlord would have protection over any type of personal goods, namely artwork, and be able to take possession of those goods.

**Be Wary of Build-Out Costs And Alterations in Customization**

Some leases, especially if the building is new construction, may have build-out provisions of the physical space for which the tenant is responsible, including plumbing, floors and ceilings. It is important to negotiate upfront who bears the responsibility for the scope and design of such improvements. Sometimes the landlord will offer a tenant an allowance or offer free rent or rent abatement as a concession for preparing the space for occupancy.

• Look to whether rent payments begin during this build-out period.
• Be mindful that you may not recoup your investment in the build-out of the space.

[^3]: As a separate matter, another safeguard for the protection of personal artwork, which is not fully discussed here, is the purchase of adequate insurance to protect the contents of your respective studio or workspace in the event of fire, property damage, flooding and other potential hazards.
• Try to get the landlord to take on build-out and absorb costs.

Major structural alterations, such as those that change the premises’ purpose or the appearance of the space, typically require the landlord’s consent and will most likely require submission of architectural and/or engineering plans.

• Tenants may not only be required to use contractors approved by the landlord, but also be required to purchase insurance approved by the landlord with certain monetary limits of liability to cover costs in the event of any property damage or personal injury caused in connection with the build-out.

Provide Ample Time To Cure Default and Know Your Obligations As A Tenant

If a tenant defaults in his or her financial obligations, a landlord will typically send out a Notice of Default letter. Thereafter, the tenant will have the option to cure the default pursuant to the specific terms provided in the lease.

• Be careful when negotiating the length of time to cure any default as such periods may be as short as 10 days for the non-payment of rent or 15 days for other defaults under the lease. The amount of time to cure the default is critical as the landlord has the ability to terminate the lease if the tenant fails to cure the default within the exact time provided in the lease.
• Other grounds of default include the tenant’s failure to honor obligations in the lease such as, breach of the Use Clause,\(^4\) subletting or assigning the lease to another tenant without the landlord’s consent, failure to maintain appropriate amounts of insurance required by the landlord, and adding structural changes or alterations without the landlord’s consent.
• The ability to collect attorneys’ fees will usually be incorporated in the lease if the landlord prevails in a lawsuit or matter concerning the tenant’s breach. It is equally important to negotiate reciprocal attorneys’ fees for tenants should the tenant need to sue the landlord for breaches of the lease.

Conclusion

When entering into any type of lease, it is important to negotiate provisions essential to your business needs, including clear and precise terms surrounding your financial obligations of rent and additional rent, and any other inadequately defined obligations. Always incorporate any agreed-to material terms and negotiations in writing as an amendment to the lease. As an artist, make sure that there are no provisions that would potentially limit your ownership of your work product or inventory in the event of default. Finally, it is crucial to understand your liabilities in connection with your failure to cure default or any breaches of the lease provisions.

\(^4\) The Use Clause defines the purpose for which the tenant may use the premises. It is important to note that some environmental provisions in leases may also prohibit the very nature of the artist’s work, e.g., if the artist handles hazardous or flammable materials, and thus the artists’ work would be in conflict with such lease provisions.
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