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By GORDON GOLUM

Don't Count on Equitable Relief

While courts may permit late exercise of an option to renew a lease, such relief is not readily granted

A tenant often negotiates a right to renew the term of its lease. This may be especially important to a tenant whose business is dependent upon the site, such as a luncheonette in an office building where customers are the office workers in the building. Even if the site is not crucial to a tenant's business, a right of renewal enables a tenant to avoid the disruption and expense of a move upon expiration of the term of the lease. Also, an option to renew affords the tenant an opportunity to fix the rent during the renewal term or, if not a specific figure, perhaps a standard for a rent increase in the renewal term, such as the Consumer Price Index.

Renewal clauses in leases generally require tenants to give notice of renewal some time prior to expiration of the term. However, tenants not infrequently fail to notify the landlord of the decision to renew the lease within the period required by the lease. Landlords may refuse to recognize a late exercise of a renewal option for a variety of reasons, such as the ability to obtain a higher rent from a third party or dislike of the tenant's operation.

Golum is a partner on the real estate team at Wilentz, Goldman & Spitzer of Woodbridge.

New Jersey courts will excuse late exercise of a renewal option in some circumstances despite the agreed to deadline for notice in the lease. The general rule in New Jersey relating to the late exercise of a lease renewal option has been stated as follows:

[F]ailure to give timely notice may be relieved against if fraud, accident, surprise or mistake are shown, or where there are other special circumstances which warrant a court of equity to grant relief against the consequences of the lessee's failure to notify the lessor within the stipulated time or in the specific form or manner prescribed [citations omitted]. It is also the general rule that equity will not relieve against mere forgetfulness." *Sosanie v. Perneti Holding Corp.*, 115 N.J. Super. 409, 414 (Ch. Div. 1971).

In *Sosanie*, the tenant operated a stationery-luncheonette business on the premises. The court applied the general rule to relieve the tenant from its failure to timely exercise its option where the delay was slight, the loss to the landlord insignificant and the tenant would have

suffered substantial harm if forced to relocate. *Id.* at 416. The court found that the tenant's conduct in forgetting the deadline for exercise of the renewal option constituted an honest mistake of fact and a special circumstance warranting relief from the forfeiture which otherwise would occur if the tenant, who had been at the site for many years, lost the right to remain there during the renewal term. See also *Marjer v. Lafymen*, 140 N.J. Eq. 68, 71-72 (Ch. 1947).

In *Goldberg's Corp. v. Goldberg Realty and Investment Co.*, 134 N.J. Eq. 415 (Ch. 1944), the tenant failed to timely exercise its option to renew its lease. The court held against the tenant who argued its failure to give timely notice should be excused. The tenant had specifically conveyed to the landlord that it was not interested in renewal but hoped to negotiate a new lease. See *id.* at 418-420. The landlord informed the tenant that another party was interested in the premises and gave the tenant another opportunity to renew. However, the tenant responded by reiterating that it would not exercise the renewal option, but was willing to work out new terms for a lease. Finally, a principal of the partnership that later leased the tenant's space, who was also a friend of the tenant, suggested to the tenant that it follow up with the lease. *Id.* at 420-21. Therefore, the tenant was on notice that the landlord was looking to lease its premises, and yet made no effort to renew until after the landlord signed the lease with a third party.

The court in *Goldberg* recognized that equitable relief may be appropriate

in some circumstances, but the court stated: "Some considerations of righteousness, justice or morality must exist to enable a court of equity to rescue parties from the natural and reasonably probable consequences of their own imprudence." *Id.* at 423.

In *The Goodyear Tire & Rubber Company v. Kin Properties, Inc.*, 276 N.J. Super. 96 (App. Div. 1994), the lease required that the tenant exercise its option to extend the term by giving written notice to the landlord not less than six months nor more than nine months prior to the expiration of the term. In this case, instead of giving notice within the window required by the lease, the tenant gave early notice of its renewal. The court held that the purpose of a lease containing a date by which a tenant must give notice of renewal is "so that the landlord is not forced to wait until the last day of the lease term before he is informed whether the tenant wishes to remain on the premises." *Id.* N.J. at 102. The court held that the tenant was entitled to renew where it had given notice before the date specified in the lease, thereby achieving that purpose.

Cases involving late exercise of an option to purchase pursuant to a lease provision are helpful in this analysis. In *Brick Plaza, Inc. v. Humble Oil and Refining Co.*, 218 N.J. Super. 101 (App. Div. 1987), involving an option to purchase provision in a lease, equity did not intervene to mitigate the hardship resulting from a tenant's failure to give timely notice of its purchase option. In *Brick*, the tenant explained that its late notice was an "honest mistake" resulting from its president's reliance on an

unexecuted preliminary draft of the lease agreement. However, the court did not excuse the late exercise of the renewal option because the delay was not slight, but rather one that extended almost five and a half months beyond the expiration of the notice period. 218 N.J. Super. at 103-104.

In *Socony-Vacuum Oil Co., Inc. v. Pabian*, 32 N.J. Super. 390 (Ch. Div. 1954), plaintiff had untimely exercised its right of first refusal to purchase property. Plaintiff knew it was bound by the 60-day notice period and promised in writing to give notice by a specific date. But, plaintiff gave oral notice of acceptance one day after and written notice of acceptance was received two days after the required date. Without any excuse, plaintiff missed the deadline. The court considered the equities in the case, finding the equities rested with the proposed contract purchaser whose offer plaintiff had the opportunity to match. Plaintiff's late notice, if held timely, would have adversely affected the contract purchaser. Additionally, plaintiff provided no notice to the proposed purchaser of its intent to purchase the property even though plaintiff was aware of the rights of the proposed purchaser in the transaction.

Waiver may be a defense for the tenant in appropriate cases where the landlord refuses to accept a late exercise of the option to renew. In *Wallworth v. Johnson*, 25 N.J. Misc. 449 (Sup. Ct. 1947), the court held that the tenant may assert as a defense that the landlord had waived the requirement for giving notice to exercise the renewal option in the lease where the tenant alleges that it remained in possession of the premises

after expiration of the lease for a substantial period until the lawsuit, paying rent which was accepted by the landlord.

The Appellate Division has held that "[t]he requirement in [a lease] for written notice of intention to renew could be waived and such waiver could be effected either by parol agreement or by the actions of the parties." *Dries v. Trenton Auto Co.*, 17 N.J. Super. 591, 596 (App. Div. 1952). The court in *Dries* held that a jury could find that the landlord's conduct constituted waiver of the notice requirement and landlord "was, therefore, estopped from enforcing its action for possession." *Id.* at 596.

A tenant might try to protect itself from forgetfulness by including a provision in the lease requiring the landlord to furnish a notice reminding the tenant of the requirement to exercise the option by the date specified in the lease. However, landlords may resist this obligation.

Another approach might be for the lease to state that it will renew automatically absent notice from the tenant that it does not desire to renew the lease. However, in this case, the tenant may find that it has renewed the lease without a desire to do so.

In conclusion, while a court may exercise its equitable powers to permit late exercise of an option to renew a lease, the relief is not readily granted and will very much depend upon the equities of a given case. A court will consider the reasons for failure to timely exercise the option, the extent of the delay and the consequences to each party if the late exercise of the option to renew is or is not excused. ■