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Wagenseller Law Firm

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Commercial Leases: Restrictions on Assignment

Commercial leases typically include restraints on transferability, namely that a tenant may not assign the lease without the consent of the Landlord. After California's Supreme Court implied a requirement of reasonableness into lease assignment consent provisions (where none had existed before), California's Legislature enacted a statutory scheme relating to the assignment and subleasing of commercial space.

Evolution of the Law

A majority of jurisdictions, including California, long held that where a lease contains an approval clause (a clause stating that the lease cannot be assigned without the prior consent of the landlord), the landlord could refuse to approve a proposed assignee, even if that refusal was arbitrary and the proposed tenant was perfectly suitable.

With time, many jurisdictions trended toward a reasonableness standard, namely that there must be some commercially reasonable objection to the assignment. California's Supreme Court, in an opinion entitled *Kendall v. Ernest*

Pestana, Inc. (1985) 40 Cal.3d 488, adopted the reasonableness standard, finding that an unreasonable refusal to assign constituted an unreasonable restraint on alienation.

The court held that the trier of fact may properly consider the following factors in determining reasonableness: financial responsibility of the proposed assignee, suitability of the use for the particular property, legality of the proposed use, need for alteration of the premises, and the nature of the occupancy, i.e., office, factory, clinic, etc. However, the court determined that a denial solely on the basis of personal taste, convenience or sensibility was not commercially reasonable. Nor was it reasonable to deny consent in order that the landlord may charge a higher rent than originally contracted for.

Justice Lucas, in a dissenting opinion, noted that the lease in

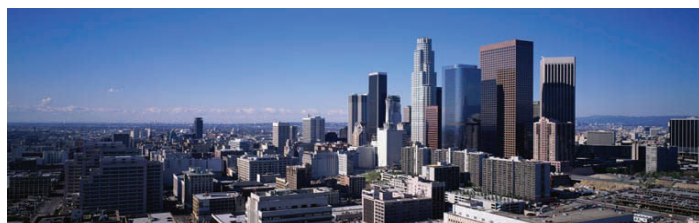
the *Kendall* case did not require a reasonableness standard. Nor had the Legislature enacted such a requirement. Justice Lucas found it improper for the court to imply a requirement of reasonableness when the Legislature had in fact specifically refused to do so and the parties had not contracted for it. "Absent such legislative direction, the parties should be free to contract as they see fit." 40 Cal.3d at 508.

The Legislature's Statutory Scheme

In response to the *Kendall* case, the California Legislature weighed in on the debate with a comprehensive statutory scheme governing assignments of commercial leases.

In general, without an express limitation, a tenant's interest in a commercial lease is freely transferable. Civ.C.

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Success: Surmounting Obstacles

We are always happy to help a client reach their goals, either in structuring a business deal or in fighting a lawsuit.

In an ongoing lawsuit between two sisters over the ownership of real property, we successfully challenged plaintiff's entry of default after plaintiff

served the summons and complaint on a relative's house but not on our client, who lives in the very same building that plaintiff lives in. While plaintiff and her counsel refused to stipulate to set aside the entry of default, the court granted our motion and denied plaintiff's request for sanctions.

In another case we petitioned the court to release a mechanic's lien on our client's development project. The lien had caused the lender to stop making disbursements on the construction loan and had held up further construction. Although the lien claimant opposed our motion, the court

(Continues on Page 2)

Leases: Restrictions on Assignment (cont'd)



Legal Update:

An action for emotional distress arising from undisclosed property defects did not constitute 'bodily injury' within the meaning of an arbitration exclusion in a California Association of Realtors residential purchase agreement. Plaintiffs' 'failure to disclose' lawsuit was ordered to arbitration, as agreed to in the CAR form.

Gravillis v. Coldwell Banker et al. (Sept. 29, 2006) 2006 SOS 5317



§1995.210. The common law, later codified by statute, also states that any ambiguity in a restriction on transfer of a tenant's interest in a lease shall be construed in favor of transferability. Civ.C. §1995.220. On the other hand, if the parties contractually agree, a party may absolutely prohibit transfer. Civ.C. §1995.230.

Consent of the Landlord

A commonly used provision in leases requires that the landlord's consent is required in order to transfer the tenant's interest. The Legislature also addressed this issue by finding that a restriction on a lease may require the landlord's consent subject to any express standard or condition for giving or withholding consent, including, but not limited to, either (a) the landlord's consent may not be unreasonably withheld, or (b) the landlord's consent may be withheld subject to express standards or conditions. Whether the consent was unreasonably withheld is a question of fact to be determined based on established case law. For example, as noted in the *Kendall* case, bases for good faith reasonable objection include "inability to fulfill terms of the lease, financial irresponsibility or instability, suitability of premises for intended use, or intended unlawful or undesirable use of premises." 40 Cal.3d at 497.

In the event that the lease does not set forth any standards for giving or withholding consent, the restriction shall be construed to include an implied

standard that the landlord's consent may not be unreasonably withheld. In the event that a landlord rejects an assignment, a tenant may make a written request for a statement of reasons for withholding consent. In the event that a landlord fails or refuses to respond, the court may find the assignment reasonable simply based on the landlord's failure to respond. In the event that a landlord provides reasons, it is a question of fact as to whether those reasons were reasonable. Civ.C. §1995.260.

Although the *Kendall* case stated that as a matter of law (versus a question of fact) a denial of consent solely on the basis of personal taste, convenience, or sensibility, and denial of consent in order that the landlord may charge a higher rent than originally contracted for, are not commercially reasonable (40 Cal.3d at 501), the Legislature rejected this absolute approach and instead made resolution of the issue a question of fact to be determined by the circumstances of the particular case. The comments to the statute specifically state that "in some circumstances, it may be commercially reasonable for the landlord to require, as a condition for consenting to an assignment, that the premium received by the tenant for the assignment be paid to the landlord. (Referring to *John Hogan Enterprises, Inc. v. Kellogg* (1986) 187 Cal.App.3d 589).

Appreciation in Rents

A common reason (often

unstated) for a Landlord's refusal to consent to an assignment of a lease is the desire to capture the appreciation in rent that has occurred since the lease was entered into. When the Supreme Court decided *Kendall*, it held that, in a lease in which the issue was not addressed, denying consent solely in order that the landlord may charge a higher rent than originally contracted for was an arbitrary reason which failed the test of good faith and reasonableness. 40 Cal.3d at 501. The court held open the possibility that the parties could contract for an allocation of increased rents, and the Legislature later codified the principal in Civ.C. §1995.240, stating that a restriction in a lease may include a provision "that the landlord is entitled to some or all of any consideration the tenant receives from a transferee, in excess of the rent under the lease." However, if not specifically addressed in the lease, this section does not create a presumption that a demand for the increased rent, absent a contractual right to such an increase, is either reasonable or unreasonable. Whether such a demand is reasonable or not would be a question of fact and subject to the existing case law.

A landlord seeking to deny a tenant's request to assign the lease should consult with an attorney who can apply the law to the specific facts in drafting a statement of reasons for the tenant pursuant to Civ.C. §1995.260. An ounce of prevention is worth a pound of cure.

Success, continued...

(Continued from page 1)

granted our petition and further awarded our client sanctions for claimant's refusal to release the lien.

We were recently able to help a client close the purchase of land in Rancho Cucamonga, including a review of the Purchase and Sale Agreement,

Promissory Note, Deed of Trust and related documentation.

We are pleased that our clients were able to achieve their objectives.

Message from Laine Wagenseller...

It has been said that successful people are not people without problems. Instead they are people who respond quickly and positively to their problems. They define their problems and then concentrate their energies on solving those problems. Most successful people do this with the help of trusted coaches and advisors.

It is our goal at Wagenseller Law Firm to help our clients surmount their problems so that

they can continue on toward their goals and dreams.

We pride ourselves on helping our clients identify issues in their developments, investments or projects as they put those projects together.

Of course, some times obstacles arise and cannot be avoided. Those problems need to be dealt with head on.

Our strategy is to sit down with the client and outline what the problem is. Once the prob-

lem is defined, we explore the different options that the client has. Next we develop a strategy for reaching the client's goals.

All successful athletes have coaches who help them achieve their goals. We hope that we can play that role with our business clients, using our knowledge and experience to allow our clients to reach their business goals.

Laine



In The Works: Cases We Have Been Working On

- We have been retained by a client to fight a Quiet Title action seeking to undo our client's purchase of property in 2003. Plaintiff claims that his power of attorney to sell the land on behalf of his mother was actually void at the time as his mother had died in Thailand in 1997. He claims that our client knew this. He does not explain why he waited three years and after our client had developed two homes on the property to seek his relief. We intend to vigorously oppose this lawsuit
- We have been retained to help a retail client negotiate a

lease extension at a shopping center in Gardena.

- Our client, a local architectural firm who designs lifestyle centers across the country, has called on us to represent them in relation to an economic development condemnation case currently proceeding in Texas.
- We are proceeding with a motion for summary judgment on behalf of our corporate warehouse tenant in a specific performance lawsuit to enforce the option agreement in their lease.
- We recently filed a malicious prosecution action in an ongo-

ing battle between our client and her sister over the ownership of an apartment building.

- We have applied for default judgment in the Orange County Superior Court on behalf of our client against a former tenant.



"Successful people are not people without problems. They are people who respond quickly and positively to their problems."

Two Distinct Choices: A Worthy Challenge

Each of us has two distinct choices to make about what we will do with our lives. The first choice we can make is to be less than we have the capacity to be. To earn less. To have less. To read less and think less. To try less and discipline ourselves less. These are the choices that lead to an empty life. these are the choices that, once made, lead to a life of constant apprehension instead of a life of wondrous anticipation.

And the second choice? To do it all! To become all that we can possibly be. To read every book that we possibly can. To earn as much as we possibly can. To give and share as much as we possibly can. To strive and produce and accomplish as much as we possibly can. All of us have the choice.

To do or not to do. To be or not to be. To be all or to be less or to be nothing at all.

Like the tree, it would be a

worthy challenge for us all to stretch upward and outward to the full measure of our capabilities. Why not do all that we can, every moment that we can, the best that we can, for as long as we can?

Our ultimate life objective should be to create as much as our talent and ability and desire will permit. To settle for less than we could do is to fail in this worthiest of undertakings.

Results are the best measurement of human progress. Not conversation. Not explanation. Not justification. Results! And if our results are less than our potential suggests that they should be, then we must strive to become more than we were the day before. The greatest rewards are always reserved for those who bring great value to themselves and the world around them as a result of whom and what they have become. *Unknown*



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Results Oriented Legal Services

Wagenseller Law Firm is a full-service business and real estate law firm. Materials contained in this newsletter are for general information purposes and to permit you to learn more about the services that Wagenseller Law Firm offers its clients. These materials are not intended to constitute legal advice relating to any specific matter and do not create an attorney-client relationship. Please consult Wagenseller Law Firm for legal advice regarding specific matters of concern.

News and Happenings...

- WLF closed down around Labor Day so that Laine Wagenseller could travel to Fayetteville, Arkansas for USC's season opener against the University of Arkansas.

- Mr. Wagenseller wrote an article on the Los Angeles County Bar Association's recent seminar entitled "**Lofts, Condo-Hotels and Other Mixed Use Projects.**" The article on the seminar will appear in a future issue of the County Bar's Real Property Reporter.

- Urban Land Institute recently conducted a case study panel on the **redevelopment of Culver City**, which Mr. Wagenseller attended. The panel of speakers outlined the effect of the coming light rail and the direction of development in that city.

- **Securities Issues in Real Estate Partnerships** was the subject of a recent Los Angeles County Bar seminar which Mr. Wagenseller attended.

- On the political front, Mr. Wagenseller was able to see the author and scholar **Dinesh D'Souza** speak on the war on terror at a Hoover Institute breakfast at the California Club.

- Former USC Law professor and now Duke University professor Erwin Chemerinsky spoke at the Federal Bar Association's recent luncheon on **recent developments in the Supreme Court**. Mr. Wagenseller attended, notwithstanding Professor Chemerinsky's political agenda.

- Mr. Wagenseller recently attended a members-only event of the **Urban Land Institute** in

Pasadena which featured that City's mayor discussing the City's approach to real estate development.

- A new season of **USC Marshall School of Business** Dean's breakfasts has begun, with Mattel's CEO and Sharon Allen, Chairman of Deloitte Touche as speakers.

Thank you to all of our clients and friends for their business and referrals. We are pleased to consult with potential clients regarding real estate and business transactions or disputes. For more information on Wagenseller Law Firm, please visit

www.wagensellerlaw.com

