

WHAT HAPPENED TO THE TENANT?

By Brian D. Womac



The negotiations between landlord and tenant have to start with who will be the parties to the contract. Identifying the parties to the lease is the first and most important starting point in any lease negotiation. Once it is determined who will be the tenant, the landlord and management have to stay on top of their tenants to confirm nothing changes throughout the lease term. The starting point is the lease document itself.

A common error made in determining who will be your tenant evolves from the faulty signature line drafted in the lease. Right now there are hundreds of fully-executed leases in the Houston area where the tenant has signed as a company and either the company doesn't exist, or the landlord intended for the tenant to be an individual. This important issue often ends up at the courthouse.

SIGNATURE DISCREPANCIES

I have seen several landlord/tenant disputes end up in litigation here in Houston because of signature discrepancies. Often, tenants claim to be a company, yet all documents indicate the tenant is an individual except for the signature line.

Landlords want personal liability whenever they can get an individual to sign and/or guarantee a lease. The issues in your lease form can create issues for the attorney later while enforcing the lease.

How does this happen? Here is one story. I filed what started out as a simple lawsuit on behalf of a landlord against an individual for rents owed. That individual signed the lease as an individual but later signed a lease amendment as president of a limited liability company. When I first received the file, I performed research

on the tenant. To my surprise, there was no listing of his company anywhere to be found. I wondered why he signed an amendment as a company yet the lease was signed by him as an individual. When I filed the lawsuit against the individual, he answered by stating that the limited liability company was responsible and not him individually. He argued to the jury for two days that the landlord made a mistake in drafting the lease as seen from the amendment.

In this case, as usual, the amendment was prepared by the landlord, and there was an obvious mistake in the name of the tenant throughout the document and in the signature line of the amendment. Mistakes normally go against the drafter, and most lease documents are drafted by landlords not tenants. Can a simple mistake in drafting avoid personal liability?

In the aforementioned case, the landlord prevailed and recovered a nice judgment against this individual. There are defenses to my situation. However, if the mistaken identity of this tenant would have been caught before signing that amendment, little,

A COMMON ERROR made in determining who will be your tenant evolves from the **FAULTY SIGNATURE LINE** drafted in the lease.

if any, litigation would have been necessary to enforce the lease as amended against the individual.

GUIDELINES TO FOLLOW

Here are some basic guidelines to follow. If the landlord is entering into a lease with an individual, do not allow the tenant to sign as an officer. Additionally, do not insert the company name of the tenant in the signature block for the tenant. Commercial lease signature lines are vital to the binding contract between landlords and tenants. Always double check the information provided by the tenant. It is important that your broker and/or management team do a little research on your proposed tenant.

The party executing the lease on behalf of the tenant has to properly identify his position with the company if he or she wants to avoid personal liability. It is imperative that the individual sets out

the title held in the company or partnership (i.e. president, director, or partner). A commercial lease to be executed by an individual should be signed by the individual and not a representative or agent. Again, do not allow the individual tenant to put anything after his name alleging he/she is an officer or agent of a company. If you want individual liability, there should be nothing designated after the individual's name.

INDIVIDUAL TENANTS

Stated another way, individual tenants can avoid personal liability by signing the lease in a corporate capacity as president or vice president. Make sure your tenant identified in the lease document is the same as in the signature line. A good practice in drafting a signature line for a tenant is first to identify your tenant. I often encounter lease documents that fail to set out the tenant correctly.

IF YOUR TENANT IS A CORPORATION

If your tenant is a corporation, then the tenant should properly designate the corporate capacity of the signer and provide a corporate resolution granting him/her power and authority to execute the lease. The individual tenant should never execute the lease in any other capacity than individually. Often, I find that individual tenants list a corporate capacity after their signature. This creates a fact question as to whether or not the tenant is an individual or corporation. The proper signature lines for tenants can be seen in *Image A*.

IF YOUR TENANT IS A PARTNERSHIP

When dealing with partnerships, the landlord must determine whether or not the signature line must be executed by all partners or only a representative of the partnership. A resolution of the partnership should be delivered to you prior to allowing an individual to bind a partnership. Prudent landlords will request a copy of the partnership documents to determine who has authority to bind the partnership on the lease.

Although landlords want personal liability when they can get it, nothing is wrong in doing a lease with a startup company as long as you have additional security. The best practice is to insist on the tenant providing a personal or corporate guarantee from someone with financial strength.

FIGURE OUT WHO IS THE TENANT

Before you begin drafting the lease, figure out who will be the tenant. It is best to obtain the information as soon as the tenant applies for the lease space. Landlords should request the following documents for identification: a driver's license, social security card or number, assumed name certificate, partnership agreement, articles of incorporation, bylaws, certificate of corporate resolutions giving authority for the officer to sign on behalf of the corporation, and/or certificate of good standing from the comptroller's office of the secretary of state. These documents should be followed up with requests for financial documents for your tenant. At the very least, the landlord should review the tenant's last year's tax return and current financials. Confirm that these financial



Image A: Proper Signature Lines for Tenants

documents belong to your proposed tenant. Do some work to determine if the prospective tenant is a tenant you want in your building.

LANDLORD CHECK-INS

You have your tenant properly identified and signed up on the lease. Now what? Other possible issues involve the original tenant disappearing during the tenancy. Just because you have a properly signed lease, management should follow up on any change in the tenant's identity or signage for the tenant which indicate another individual or company is in possession of the lease space. Too many times, I have seen tenants occupying a lease space that are not the same company or individual that originally signed the lease.

In two recent cases, the discrepancy created problems for the landlord when the cases were presented for collection. Those cases involved tenants that sold their businesses to new parties after

executing the leases. The new parties took possession of the leased premises without obtaining authorization from the landlord or ever assuming the obligations under the lease via a valid assignment. The result is that the new company would not be liable to the landlord for any rents other than rentals owed for the period of time the company or individual was in possession of the lease space.

In most of the cases, the original tenant either dissolves or files for bankruptcy protection and/or sells its business to the new company without authorization or approval from the landlord. If the landlord is not aware of this transfer, the new tenant would not become liable for the future obligations under the terms of the lease unless he/she specifically assumed those obligations from the original tenant or the landlord. When you do not have a signed contract or assignment document for the new tenant, the landlord

loses the right to enforce future obligations under the lease document.

The landlord's management team must have checklists that include confirming that the tenant has not changed. Requesting annual insurance certificates and actually reading them to confirm the original tenant is still your tenant is just one way to stay on top of things. If you see name changes on rent checks or signage, start asking questions. **N**

Brian D. Womac is celebrating 30 years as a licensed attorney and specializes in commercial landlord/tenant lease negotiations and litigation. His client base consists of corporations, partnerships, construction companies, lending institutions, insurance companies, investors, management and leasing companies, and many other businesses owning real estate. Mr. Womac has been board certified in commercial real estate law since 1991 and has personally negotiated and litigated commercial landlord/tenant matters for over 28 years.