

When Signed Lease is Not Enough - Commercial Tenants in Massachusetts

Tuesday, May 17, 2016

Renting retail space in a shopping center? An office in downtown Boston? A parcel of land for development in the suburbs? For many commercial tenants, a fully executed lease may not be enough to protect long term interests and investments in the property without recording a Notice of Lease. For commercial landlords, a recorded Notice of Lease can interfere with future plans for the property by creating a cloud on title. What follows is a brief introduction to these notices and what each party can do to better protect itself.



What is a Notice of Lease?

A Notice or Memorandum of Lease briefly summarizes the key terms of a lease and is recorded (or registered) at the same Registry of Deeds in which Landlord's deed is recorded. For our purposes, a Notice of Lease should contain:

- the date of the lease
- the commencement date
- the length of the lease
- all extension/renewal rights
- notarized signatures of the parties
- a description of the premises matching the description in the lease
- a description of any additional areas over which Tenant has an expansion option

The Notice should not include details about the amount of rent, operating expenses, or other information usually kept private.

Although not required, Tenant should also reference any rights of first refusal, options to purchase, restrictions or exclusive use provisions contained in the Lease. References to these provisions need not go into great detail at the risk of accidentally limiting the effectiveness of the Notice.

Why record a Notice of Lease?

In Massachusetts, **if the lease term is for more than seven years** and Landlord conveys the property, in most situations, new owners are not obligated to recognize an existing lease and are not held to the terms of the lease unless the new owner had prior "actual notice" of the lease. It is up to the Tenant attempting to enforce its

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lease to prove that the new owner was aware of the lease before purchasing the property. Surprisingly, it is not enough that the new owner saw Tenant operating its store or working out of its offices. After all, Tenant may only have a license or a month-to-month tenancy. For the same reason, it is not enough that the new owner was aware of the lease if the owner did not know the duration of the term.

Recording a Notice of Lease is notice to the world. The law presumes that the new owner was aware of the lease prior to its purchase. Moreover, the law presumes that the Notice extends to all of the terms of the lease, not only the terms contained in the Notice.

Tenant is protected and the new owner must recognize Tenant's lease.

What if the Original Term of the Lease is for Seven Years or Fewer?

If the original term of a lease is for seven years or fewer, but contains either:

1. an extension period that renews the lease automatically; or
2. an option to extend or renew that does not require Landlord's consent (*i.e.* if Tenant has the unilateral power to extend the term or allow the lease to terminate),

resulting in a potential term greater than seven years, then a Notice of Lease should be recorded. Example: If the original term is for six years and Tenant has an option to extend for another three years, a Notice should be recorded. **If the original term of a lease is seven years or fewer and is later amended to extend the term**, the lease is only considered recordable and a Notice of Lease should be recorded if the term of the lease will continue (or if Tenant has the option of continuing regardless of what Landlord desires) for more than seven years *from the date of the Amendment*. Example: If the original term was for six years and in Year Five the lease is amended to run for another three years, a Notice does *not* need to be recorded.

If the original term of a lease is seven years or fewer and Tenant cannot extend without Landlord's consent, it is not necessary to record a Notice of Lease. Any new owner is bound by the terms of the lease regardless of whether it was aware of the lease when purchasing the property.

Tenants should insert a provision in the lease explicitly requiring both parties to sign a Notice of Lease and allowing Tenant to record the Notice at the appropriate Registry.

What Precautions Should a Landlord Take?

If Tenant has the right to record a Notice of Lease, a forward thinking Landlord should add provisions to the lease designed to protect its title. Otherwise, if the lease is terminated early (*e.g.* Tenant defaults; or Tenant exercises an early termination right), the Notice of Lease will remain as a cloud upon Landlord's title until the original term and any extension periods have passed.

To prevent such a result, a Landlord should insert provisions into the lease:

1. prohibiting Tenant from recording a Notice of Lease if the term of the lease cannot continue for more than seven years without Landlord's future consent; and
2. requiring Tenant, at the time the lease terminates, to execute and record a discharge of the Notice of Lease and granting Landlord a power of attorney to do so on Tenant's behalf should Tenant refuse (with this provision surviving the termination of the lease).

There are other factors to consider that are beyond the scope of this post, including:

- What if the lease is amended after the Notice of Lease is on record?
- What if there is a sublease the premises from an existing tenant?
- What if Landlord assigns or transfers its interest in the lease?

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