Lowndes

Insights

When are Unilateral Termination Rights in a Commercial Lease Enforceable?

Lowndes Leasing Lawyers Blog
11.15.2018

We will often see a commercial lease that provides a right of termination to only one of the parties to the lease and it begs the question, "is this really a contract if one party can walk away at any time?" Phrased differently, when will a unilateral right of termination render a lease illusory such that it is not really an enforceable contract at all? The short answer is that unilateral termination rights without any limitation or condition render a contract illusory and make that contract terminable by either party. If, however, the contract places minimal limitations on the unilateral termination, even if not rigorous or burdensome, the contract is not illusory and will be upheld.

The Second DCA ruled on the enforceability of a unilateral termination provisions without conditions precedent in the commercial context in Pick Kwik Food Stores, Inc. v. Tenser, 407 So.2d 216 (2nd DCA 1981). In Tenser, the Court reviewed whether a bilateral contract that is terminable at will by one party without any conditions or limitations is unenforceable due to lack of mutuality of obligation. In Tenser a tenant leased a gas station from the landlord. The Contract allowed the tenant to install necessary equipment and required maintenance of same. Net profits from the gasoline venture were to be split equally. The lease permitted the tenant to terminate the lease at any time and remove the equipment at any time. The Court held that "A bilateral contract terminable at the will of one party is not binding, and may be terminated by either party without liability for payment of damages representing lost profits anticipated by the other. This rule is sometimes expressed as the requirement that there must be mutuality of obligation with respect to contracts to be performed in the future." Thus, the contract was void for lack of consideration as one party could terminate at any time and for any reason.

The Court in Tenser did not, however, address the issue of whether a lease that required minimum notice would be void for lack of consideration. In Alchar Hardware Co. Inc, v. Tavormina, 759 F.2d 867 (11th Cir. 1985), the Court held that where one party could terminate a contract only upon certain conditions, the right of termination did not render the contract unenforceable. The Court writes, "The trustee first contends that the lease

Related Attorneys

James E. Walson

Related Expertise

Commercial Leasing

between Weiner and Alchar was unenforceable because it provided for an unrestricted right of termination. If so, this would defeat Weiner's claim....however, the lease provides for termination only if the lessor decides to remodel, alter or demolish all or part of the premises, gives 60 days' written notice, and returns any security deposit. This is enough to render the contract enforceable."

Thus, in the commercial context, either party may retain a unilateral right to terminate a contract so long as it is somehow limited or conditioned. In Lauren, Inc. v. Marc & Melfa, Inc., 446 So.2d 1138 (3rd DCA 1984), the Court reviewed a termination clause which read, "In the event the Company should at any time during the term of this Agreement deem that its machines being leased herein are being misused, jeopardized or neglected by the Proprietor, or that the sales made in the coin-operated machines in the revenue derived therefrom are inadequate and not in accordance with the Company's minimum requirements, then, and in that event, the Company shall have the option to forthwith terminate this Agreement...." The Court held that where there are stated preconditions to the termination, although not rigorous or burdensome, the contract was not void for lack of consideration.

The Court in Lauren, Inc. relied on Williston's Restatement of Contracts which provides, in relevant part, "An agreement wherein one party reserves the right to cancel at his pleasure cannot create a contract. Since the courts, however, do not favor arbitrary cancellation clauses, the tendency is to interpret even a slight restriction on the exercise of the right of cancellation as constituting such legal detriment as will satisfy the requirement of sufficient consideration; for example, where the reservation of right to cancel is for cause, or by written notice, or after a definite period of notice, or upon the occurrence of some extrinsic event, or is based on some other objective standard."

Finally, the Fourth DCA in Sugar Cane Growers Cooperative of Florida, Inc. v. Pinnock, 735 So.2d 530 (4th DCA 1999), held that a 10 day notice provision was a sufficient restriction on the right to terminate such that it rendered the contract enforceable. See also Avatar Development Corporation v. De Pani Construction, Inc., 834 So.2d 873 (4th DCA 2002).

When drafting unilateral termination provisions that require minimal conditions to their being triggered, one should be cognizant that some condition or burden must be placed on the terminating party so as not to void the entire agreement.