



# OFFICE ~~House~~ of Cards Awaiting with Tenant Build-Out Projects

You signed your lease in January and your current lease expires in November. Plenty of time to design your space, pull permits and be into the new digs by mid-October with plenty of room to spare. Everything is going great until...COVID-19. Everything shuts down. What happens now?

If you think about commercial leasing or even residential leasing or homebuying, they are all a series of interdependent transactions. If someone breaks the chain, all hell breaks loose. Think about a home buyer who needs to sell her current home in order to fund the purchase of her new home. If the day before closing, her buyer defaults, she is no longer able to complete her purchase. Her seller may now have a problem buying his next home etc. The same happens in commercial real estate. When one tenants moves out, another will be moving in. If the current tenant cannot vacate in time, that exposes the successor tenant who won't be able to move in on time. One holdover begets another holdover.

Luckily for the real estate world, these broken chains are usually few and far between and the impact can be mitigated through overtime workers, temporary space or even paying some punitive holdover rent. Now, however, we're in completely uncharted waters. In a growing number of states, the government has

mandated (or will soon mandate) the suspension of all non-life essential businesses. In most dictionaries (and government proclamations), this does not include construction, demolition, design work or movers. Thus, virtually every tenant build-out project is either going on hiatus or getting cut back significantly. Inevitably, there will be an avalanche of delays rippling down the chain.

## THE POTENTIAL CLAIMS AND LIABILITIES

Some of the more interesting questions that ultimately must be answered are:

- 1 Will the tenants who can't get out on time be treated as holdover tenants by their current landlords or, even worse, be evicted by their landlords?
- 2 Will these tenants claim that COVID-19 is a force majeure which prevented them from vacating in a timely manner so that they are entitled to additional time?
- 3 Is the covenant to surrender the space by the expiration date one that is entitled to the benefits of force majeure or is that risk solely on the tenant?

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- 4 Will landlords who are responsible for the build out of a new tenant's space be held responsible for the late delivery of the new premises? If they are successful, what happens to the tenant who is now subject to liability for its holdover that its current space? Will the landlord's defense of force majeure be used against them by their holdover tenants?
- 5 How will the chain reaction be broken? If one landlord allows its current tenant to stay a little longer, will the new, incoming tenant's landlord allow them to stay longer (and without penalty) as they wait for their new space to open up? What happens when one tenant in the chain is saved but another tenant in the chain is not (or refuses to defer its tenancy)?
- 6 Many holdover provisions impose huge potential liability on the tenants including a multiple of their current rent plus actual and consequential damages. The stakes might be enormous for tenants treading in these waters.
- 7 These are just some of the claims and potential liabilities that await tenants and landlords in the world of commercial real estate. The longer the COVID-19 shutdown continues, the more tenants will be trapped in this very scary predicament and the more likely it will be that the dominoes start to fall.

## SOLVING THE PROBLEMS

How will commercial landlords and tenants resolve these issues which could potentially ruin already fragile companies emerging from the COVID crisis? In the ideal world, all parties will play nice in the sandbox and make accommodations for their counterparts. However, that is unlikely to work in all circumstances. It may very well require legislation which puts a temporary moratorium on any eviction or holdover claims, much as the federal government has done with foreclosures and some residential evictions.

While we are waiting to see how this all plays out, tenants should get their lease documents out and have their advisors review the relevant provisions including, surrender, holdover, force majeure and tenant work letter/tenant build out. It may be that the language addresses some of these issues. If not, tenants need to know what their exposure is. The best tact is to identify the problem as early as possible in the process and start a dialogue with your landlord(s). If you believe you will be late in vacating your existing space, you may be able to get a short term extension from your landlord assuming they have not yet leased it (or the next tenant doesn't need immediate possession). If they have leased the space but the incoming tenant has enough advanced warning that it won't be able to possess the space on time, it may be able to get a short term extension from it's landlord thereby relieving the time pressure.

## CONCLUSION

The COVID-19 crisis has brought forth a slew of new and unanticipated problems for businesses to deal with. Delays now piling up in world of tenant construction projects is one more. As so many lease transactions are ultimately dependent on the ones before and the ones after them, these chains are only as strong as its weakest link. Read your lease and be prepared. And maybe hope for some legislative help.