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The Enforceability of No-Waiver Provisions in Commercial Leases

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When faced with the argument that it has violated its lease, a commercial tenant often takes the position that the landlord, by its conduct and/or inaction, has waived such alleged breach. Anticipating such arguments, commercial landlords frequently insert "no waiver" provisions into their leases. In one form or another, these provisions typically state that any waiver of a lease provision by the landlord must be in writing and that the landlord's conduct and/or inaction with knowledge of the tenant's breach, standing alone, will not constitute a waiver.

As with any other provision in a negotiated commercial lease between sophisticated parties of relatively even bargaining power, Courts will generally enforce "no waiver" provisions. Nevertheless, courts sometime hold — again, as with any other commercial lease provision -- that no-waiver provisions can themselves be waived.

Illustrative Cases

Two cases — one from the Court of Appeals and the other from the Appellate Division, First Department — illustrate circumstances in which "no waiver" provisions will be enforced as written.

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In *Jefpaul Garage Corp. v. Presbyterian Hosp. in City of New York*, 61 N.Y.2d 442, 474 N.Y.S.2d 458(1984), a commercial tenant attempted to exercise a lease renewal option. The landlord, however, rejected the renewal; while the lease required that the tenant not be in violation of the lease at the time of renewal, the landlord asserted that the tenant owed several items of back rent and real estate taxes. The tenant, for its part, argued that the landlord had continued to accept rent with knowledge of such defaults, thereby waiving them,and thus permitting the tenant to exercise the option. In response, the landlord cited the lease's no-waiver clause, which provided, in relevant part:

> The receipt by Landlord of rent with knowledge of the breach of any covenant of this lease shall not be deemed a waiver of such breach and no provision of this lease shall be deemed to have been waived by Landlord unless such waiver be in writing signed by the Landlord.

61 N.Y.2d at 446.

The Court of Appeals, citing the lease's no-waiver clause, held that the landlord had not waived the conditions precedent to renewal as a matter of law:

> Its language is clear and unambiguous. The parties having mutually assented to its terms, the clause should be enforced to preclude a finding of waiver of the conditions precedent to renewal.

Id.

Similarly, in *Excel Graphics Technologies, Inc. v. CFG/AGSCB 75 Ninth Avenue, L.L.C.*, 1 A.D.3d 65, 767 N.Y.S.2d 99 (1st Dep't 2003), the commercial lease at issue prohibited the tenant from subletting the premises without the landlord's prior written consent, which was not to be unreasonably withheld; and, further, provided that the landlord's consent to one subtenant did not relieve the tenant's obligation to obtain prior written consent as to future sublets, and that the listing of a subtenant's name on the door or building directory shall not be deemed a consent. The lease also contained general non-waiver clauses providing that the landlord's acceptance of rent with knowledge of any breach of the lease is not to be deemed a waiver of such breach and that the landlord's failure to insist on the strict performance of a lease obligation shall not be construed as a waiver. A merger clause required that any waiver of a lease provision be in writing signed by the party against whom enforcement of the waiver is sought.

The tenant subleased the premises to eight different entities, admittedly without the landlord's prior written consent.The landlord consequently served a default notice upon the tenant. In response to the default notice, the tenant commenced an action and sought a *Yellowstone* injunction tolling the notice, asserting that the landlord waived the lease's prior written consent requirement by listing the subtenants' names on the building directory

and accepting rent from the tenant with knowledge of the subtenancies.

While the lower court had denied the landlord's motion to dismiss the complaint, the Appellate Division reversed and granted the landlord's motion:

> … [T]he parties to a commercial lease may mutually agree that conduct, which might otherwise give rise to an inference of waiver, shall not be deemed a waiver of specific bargained for provisions of a lease … Here, the lease specifically provides that the listing on the building directory of the names of the subtenants whose sublets have not received the landlord's prior written consent shall not be deemed consent to the sublet. In addition, the lease specifically provides that the landlord's acceptance of rent with knowledge of the tenant's breach of the lease shall not be deemed a waiver of such breach. Thus, Supreme Court erred in disregarding the clear, unambiguous terms of this negotiated lease …

1 A.D.3d at 70.

Citing the other provisions of the lease mentioned above, the court concluded: "Since each of plaintiff's factual arguments in support of its waiver claim is negated by the express language of the lease, the cross motion to dismiss based on documentary evidence should have been granted." *Id*.

Will the Clauses Hold Up?

Notwithstanding these cases, it is clear that no-waiver clauses will not hold up in all circumstances. For instance, in *Simon & Son Upholstery, Inc. v. 601 West Assocs.*, 268 A.D.2d 359, 702 N.Y.S.2d 256 (1st Dep't 2000), the lease limited the use of the subject premises to furniture manufacturing, and, further, limited the tenant's elevator usage to certain specified times. Notwithstanding the terms of the lease, the landlord — while not providing explicit permission — apparently consented to the tenant's use of the premises for a photographic studio, and the premises were renovated for that purpose with the landlord's full knowledge and involvement. Thereafter, the landlord, among other things, accepted overtime payments from the photography studio for usage of the elevator at times other than those set forth in the lease, and provided the tenant parking for the photography studio. The lease contained no-waiver and merger clauses; their specific terms, however, are not stated in the decision.

A subsequent landlord, relying on the terms of the lease and the no-waiver clause, refused to provide off-hour elevator service, and the tenant sought an injunction compelling the new landlord to provide such service. The Appellate Division, First Department upheld the injunction granted by the lower court, holding that the prior landlord's "active involvement" in the tenant's non-conforming use of the premises precluded the new landlord's reliance on the no-waiver clause:

> We recognize that the lease contained nonwaiver and merger clauses, but note that in this case the prior landlord was fully apprised and involved in the photography studio modifications, including approving the renovations, providing tenant parking, accepting payments from the photography tenant, and using the premises in a sales brochure.

268 A.D.2d at 360.

Crucially, the court distinguished the facts before it from those in *Jefpaul*, *supra*, and explained why the no-waiver clause did not preclude a finding for the tenant:

> This active involvement is in stark contrast to the landlord's passive acceptance of late rent payments in *Jefpaul Garage Corp. v. Presbyterian Hosp. in City of New York*, 61 N.Y.2d 442, 474 N.Y.S.2d 458, 462 N.E.2d 1176. Here, in distinction to *Jefpaul*, there are sufficient indicia that the reasonable expectations of both parties under the original lease were supplanted by subsequent actions.

Id.

Similarly, in *Madison Ave. Leasehold, LLC v. Madison Bentley Associates LLC*, 30 A.D.3d 1, 811 N.Y.S.2d 47 (1st Dep't 2006), the court held that even in the face of a no-waiver clause, a landlord's habitual acceptance of late rent from the tenant without protest for a period of over three years precluded the landlord from belatedly holding the tenant in default for such delinquent payments. The court held that "[t]he course of conduct of the parties to the lease clearly establishes waiver of its timely payment provision as a matter of law." *Id*., 30 A.D.3d at 7.

Conclusion

How can these two lines of cases be reconciled? Not easily, but some general principles can be discerned. The mere acceptance of rent with knowledge of, but no affirmative acquiescence in, a default will usually permit a landlord to rely on a no-waiver clause. However, the more that a landlord affirmatively assists in the tenant's default or engages in a "course of conduct" that changes the parties' "reasonable expectations," the less likely it is that a no-waiver clause will save the landlord.

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