

Lease Amendments And Guaranties: A Trap For The Unwary

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A guaranty is a critical aspect of any lease arrangement because it provides additional assurance to the landlord that the tenant's obligations under the lease will be satisfied. However, in many states, a material alteration of a guaranteed lease made without the guarantor's consent will operate to release the guarantor from liability under the guaranty. This result can leave a landlord without the protection it believed it had put in place when the lease was signed.

The issue of preserving lease guaranties merits particular attention during these challenging economic times, as more tenants approach landlords to request lease concessions and landlords and tenants work together to restructure leases. This article provides a brief overview of the laws of a handful of jurisdictions as they relate to this issue, including Massachusetts, New York, New Jersey, Maryland and the District of Columbia; and proposes several strategies that landlords can use to ensure that lease guaranties are preserved in the event of any lease modifications.

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OVERVIEW OF STATE LAWS

The general rule in Massachusetts, New York, New Jersey, Maryland and the District of Columbia is that a guarantor may be released from liability by reason of a modification of the lease made between the landlord and tenant or between an assignee of either or both parties without the guarantor's consent. In other words, if a tenant defaults after a lease has been amended without the guarantor's consent, and the landlord looks to the guarantor to fulfill the tenant's obligations, the guarantor may defend itself by arguing, quite correctly, that it no longer has any obligation under the guaranty.

Although Massachusetts, New York, New Jersey, Maryland and the District of Columbia all follow the general rule described above, landlords should be aware of the variations particular to each jurisdiction. It is particularly important to note that while some jurisdictions take the approach that the guarantor's obligations are only discharged to the extent that they were altered, many jurisdictions follow the rule that the guarantor's obligations are

discharged completely. This is the case in Massachusetts and Maryland, where the modification of a guaranteed lease may be enough to discharge the guarantor's liability completely even if the modification is favorable to the tenant.

New York also follows this approach and even provides that a non-material modification of the lease may be sufficient to discharge the guarantor from liability. New York courts have also offered specific guidance on the effect of rent reductions, finding that a rent reduction without more will not release a guarantor from liability. However, if the reduction is part of an agreement that imposes new duties on the tenant or extends the time for payment, then the guarantor's liability will be discharged.

Unlike Massachusetts, Maryland and New York, New Jersey provides that in order to discharge a guarantor from liability, the modification of the underlying lease must either injure the guarantor or actually increase the guarantor's risk or liability. Furthermore, where a guarantor's obligations are discharged due to a mate-



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rial alteration of the lease, the obligations are not completely discharged; rather, the guarantor's obligations are only discharged to the extent that the guarantor would otherwise suffer loss as a result of the modification.

The District of Columbia takes a similar approach providing that in order for a guarantor's liability to be released, the lease modification must be both substantial and prejudicial to the guarantor's rights. However, unlike in New Jersey, such an alteration will discharge the guarantor's liability completely, and not only to the extent that it was altered as a result of the lease modification.

STRATEGIES AND BEST PRACTICES

Landlords can use several basic strategies to preserve guaranties in the event of a lease modification.

1. Draft Lease Guaranties Broadly Enough so that Guarantors Prospectively Consent to Lease Modifications. The parties to a lease should be sure to draft lease guaranties so that guarantors prospectively consent to lease amendments, extensions or other modifications. Landlords should include the following provisions in the guaranty:



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- The guaranty shall apply to the lease, as well as to any extension, renewal or amendment of the lease and to any holdover period following the expiration of the lease term.
 - The obligations of the guarantor shall not be released by any modification of the lease even if made without the guarantor's consent. In the case of any such modification, the liability of the guarantor shall be deemed modified in accordance with the terms of such modification.
 - Any act of the landlord waiving terms or conditions of the lease or granting extensions of time to the tenant may be done without the guarantor's consent and without releasing the guarantor's obligations.
 - The guaranty shall include any liability of tenant which accrues under the lease for any period preceding as well as any period following the term set forth in the lease
- These types of provisions will go a long way toward preserving the guaranty even if the lease is eventually modified.

2. Obtain the Guarantor's Consent to All Lease Modifications. The most important thing landlords can do to preserve a guaranty in the event of lease modification is to obtain the guarantor's consent to all agreements between the parties with respect to the lease. As described above, even a material alteration of the underlying lease terms will not discharge the guarantor's liability so long as the guarantor has consented to such obligation.

Recent New York case law demonstrates just how critical it is that guarantors sign all lease modifications. In the case of *Lo-Ho LLC v. Batista*, 62 A.D.3d 558 (N.Y. App. Div. 2009), the guaranty provided that it would "remain and continue in full force and effect as to any renewal, change or extension of the lease." The



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tenant held over after the expiration of the lease term, and then entered into a renewal agreement titled an "Extension of Lease" with the landlord without obtaining the guarantor's consent. Despite the broad language of the guaranty, the court found that the renewal agreement was in fact a new contract with terms sufficiently different from those of the original lease so that the guaranty no longer applied.

CONCLUSION

In short, the fact that a guarantor's obligations may be discharged if the underlying lease is modified without the guarantor's consent presents a potentially devastating trap for the unwary. Landlords can protect themselves against this undesirable result by drafting guaranties in which the guarantor prospectively consents to all lease modifications and, most importantly, by requiring the guarantor to consent to all lease modifications. These simple strategies will help ensure that the landlord actually gets what it bargained for. **SCB**

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