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2:15 PM – 3:30 PM**

Peer to Peer 7

Late Delivery and the Rent Commencement Date - When Good Delivery Goes Bad

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DESCRIPTION OF SESSION

While landlords and tenants go into leases with the same objective – to get the tenant open, operating and paying rent – they may have a difference of opinion as to whether the conditions required to get to that point have been met. This interactive workshop will explore what the parties in the fact patterns discussed below did correctly, or could have done differently, in order to get to the same place – delivery of possession and rent commencement.

Participants at each table should analyze each fact pattern, and select someone to take notes for the table and someone to be the “Reporter” – it is okay for one person to serve both positions. We will then discuss key issues raised when trying to achieve delivery of possession and rent commencement.

FACT PATTERN NO. 1

Charge-Them-More Developers, LLC (“Landlord”), a global developer, owner and operator of shopping centers, has entered into a lease with Give-Me-More Enterprises, Inc. (“Tenant”), a national retailer of discount and off-price widgets, for a store containing approximately 10,000 square feet (the “Premises”) in a shopping center known as Schitts Creek Commons (the “Shopping Center”). Unfortunately, neither party used an attorney who regularly attends the ICSC Law Conference, and some issues have arisen regarding whether the “Delivery Date” has occurred. The lease provides that the Delivery Date will not occur until the following criteria have been met:

- (i) completion of Landlord’s Work and delivery of Landlord’s notice regarding completion;
- (ii) Landlord and Tenant have jointly inspected the Premises to confirm substantial completion of Landlord’s Work and prepare a punch-list;
- (iii) written acceptance of the Premises by Tenant;
- (iv) Landlord has entered into a lease with SaveMore/EatMore Supermarket for 50,000 square feet, and such tenant has opened for business;
- (v) Landlord has delivered to Tenant a subordination, non-disturbance and attornment agreement in the form attached to the lease as Exhibit G, executed by the holder of the mortgage encumbering the Shopping Center;
- (vi) Landlord has delivered to Tenant a certificate of occupancy for the Premises;
- (vii) receipt by Tenant of Landlord’s written approval of the plans for Tenant’s Work;
- (viii) Tenant’s receipt of all required building permits and approvals for Tenant’s Work from local governing agencies; and
- (ix) Tenant’s receipt of the first installment of the Construction Allowance at least ten (10) days before Tenant is ready to commence its work.

Questions for Fact Pattern No. 1

1. During the walk-through Tenant agreed that the work was substantially complete, but due to the volume of new stores Tenant is opening this quarter, it cannot get its construction manager to focus on signing the acceptance letter. How could this concept have been addressed, other than requiring a written acknowledgement from Tenant?
2. SaveMore/EatMore has opened, but it is primarily a fulfillment center. Only 15,000 sf is open for the public to walk around and take items off the shelves; the rest is used for preparation of delivery and drive-up orders. Tenant argues that this operation doesn't qualify as a true supermarket. Has Landlord met the supermarket delivery requirement?
3. Landlord's Work (demo the existing improvements and provide a vanilla box with some improvements) does not require Landlord to provide any ADA-accessible restrooms. Pursuant to the Schitts Creek Zoning Code, the building inspector cannot issue a certificate of occupancy until the restrooms are installed, which is part of Tenant's Work. Tenant will not start its construction until Landlord satisfies the delivery conditions, but Landlord cannot achieve the Delivery Date without the certificate of occupancy. How should the lease have been drafted to avoid this Catch-22?
4. Tenant dragged its feet in submitting a complete application for its building permits and, once submitted, it has half-heartedly followed up with the town, whether to answer questions or make requested adjustments to the plans. Because Landlord has a good working relationship with the town, it would like to step in and obtain the permits on Tenant's behalf, which Tenant is resisting. Does Landlord have the right to pursue the permits for Tenant?
5. Tenant has mobilized its general contractor and is ready to start work. However, since Landlord was not aware of the start date it has not paid the first installment of the allowance. Accordingly, Tenant argues that the Delivery Date has not occurred. Landlord believes that Tenant had a moral (if not contractual) obligation to notify Landlord of the construction start date, so the funds could be paid in a timely manner. Who has the upper hand in this argument?

FACT PATTERN NO. 2

Landlord also entered into a lease with Seafood Shack ("Tenant"), a local restaurateur. Landlord is excited about bringing Tenant to Schitts Creek Commons and the foot traffic it will draw. Landlord jumps at the opportunity and completes the improvements it agreed to make to the space by August 15, 2020.

On August 30, 2020, Landlord sent Tenant a delivery of possession letter stating:

"As of 08/01/2020, Landlord will have substantially completed its construction, if any. Accordingly, possession of the Premises is hereby tendered to you and the date hereof shall establish the "Possession Date" for all purposes under the Lease.

You may now enter the space and commence construction of your leasehold improvements in accordance with plans approved by Landlord only after the following requirements are satisfied:

- Plans and Specifications have been approved by Landlord
- Fully executed lease by Landlord or executed early access letter
- A building permit has been issued, if applicable
- Certificate of Insurance, as defined under the Lease
- Construction security deposit
- Pre-construction meeting with mall management
- Construction scheduled."

Landlord approved Tenant's Plans and Specifications on October 1, 2020, and Tenant obtained its building permits on January 15, 2021. Landlord gave Tenant keys to the Premises on that same day (January 15, 2021). Unfortunately, Tenant's build-out has been moving slowly. By May 1, 2021, Tenant seems to be running out of money. Landlord still believes that Tenant is a good catch (*pun intended!*) and wants to help Tenant to open for business. Landlord pays Tenant the first installment of the Tenant Allowance on May 20, 2021, even though Tenant has not satisfied all of the conditions for that payment.

The situation has only gotten worse by July. Tenant has not made much progress, and Landlord is now convinced leasing space to Tenant was a mistake. Landlord calls its outside counsel and asks for help. Landlord's

counsel identified the following provisions in the Lease:

- (i) The Term of the Lease shall commence on the date (the "Commencement Date") of the execution of this Lease by Landlord and Tenant. Tenant's obligation for the payment of Base Rent and Additional Rent shall commence on the date (the "Rent Commencement Date") which is the earlier to occur of (a) the date Tenant opens its store in the Premises for business to the public; or (b) the Latest Commencement Date set forth in the Data Sheet.
- (ii) The Data Sheet provides that the Latest Commencement Date is one hundred twenty (120) days after the latest to occur of (a) the date that Landlord tenders possession of the Premises to Tenant, (b) the date Landlord approves Tenant's Plans and Specifications, and (c) the date Tenant obtains its building permit for Tenant's Plans and Specifications.
- (iii) The Lease defines "Default" as, among other things, (a) failing to pay Rent when due (after notice and an opportunity to cure) or (b) failing to open within ten (10) days after the Rent Commencement Date.
- (iv) Upon a Default, Landlord may, at its sole discretion, take any of the following actions (A) immediately terminate this Lease and Tenant's right to possession of the Premises by giving Tenant written notice that the Lease is terminated, or (B) have the Lease continue in effect for so long as Landlord does not terminate the Lease and Tenant's right to possession of the Premises.

Questions for Fact Pattern No. 2

1. When did Tenant get possession of the Premises?
2. Did a "Default" occur? If so, when? If not, what needs to happen for a Default will occur?
3. When was the Rent Commencement Date?
4. Can Landlord terminate the Lease and/or Tenant's right to possession of the Premises?