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LAW REPORT

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Social Media and Commercial Real Estate

Is your commercial real estate company planning to "step up" its social media presence? Businesses increasingly are using social media to develop relationships with buyers, tenants, and brokers, and to drive customer traffic to their properties. If your company conducts business using social media, keep in mind that your electronic communications via social media may create an enforceable contract.

In this digital age, don't assume that "writing" and "signature" mean "pen and paper."

What's the Statute of Frauds?

The Statute of Frauds, a contract law with roots in 17th Century England, provides that certain contracts – like contracts for the sale of real property or contracts to lease real property for more than one year – will not be enforceable unless the contracts are memorialized in a writing, signed by the party to be charged (or an agent with written authority to act), and contain all material terms of the transaction. The Statute of Frauds is intended to prevent fraud and to safeguard the integrity of contracts.

J.J. Sherman

How could the Statute of Frauds affect your real estate deals?

For centuries, a "writing" meant a physical document and a "signature" meant a physical signature, but that is changing. In recent years, a number of state courts have concluded that contracts relating to real property can be entered into via e-mail. In jurisdictions like New York, if you have an e-mail exchange relating to the sale or long-term rental of real estate that includes a clear description of the property, price, and any other "material terms" plus an electronic signature, you may unknowingly enter into an enforceable contract.

Theoretically, contracts affecting real property might be made via social media exchanges between parties or their agents, although this specific legal question is not yet settled. If an e-mail is considered a "writing" for purposes of the Statute of Frauds, then social media – another form of electronic communication – also could be considered a "writing." In most of the fifty states and the District of Columbia, an "electronic signature" is defined as "an electronic sound, symbol or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record." Applying this definition, it's possible that something as simple as a Twitter hashtag adopted by someone could be considered the person's electronic signature. Finally, while social media exchanges are characteristically brief, if all material terms are included, the Statute of Frauds may be satisfied to form a contract.

Why is this so important in the commercial real estate business?

Since real property is considered "unique," and a breach of a real property contract cannot be remedied adequately with money damages, the law permits a plaintiff to sue for specific performance, an equitable remedy that, when granted by a court, forces the defendant to perform its obligations under a contract. This means that a non-prevailing party could be ordered by a court to sell or lease its property on the terms set forth in an e-mail or social media communication.

Best Practices for Social Media and Commercial Real Estate

1. Keep it general. In much of the case law involving e-mail and real estate, the deciding factor as to whether a contract was formed under the Statute of Frauds was whether all "material terms" were included in the correspondence. Use social media as a means of "getting the word out," and developing relationships, but be wary of providing too many specific deal terms that could lead to a finding of "material terms." Social media is very well-suited for announcements and statements of a general nature. To market specifics, add a link to your website where information is available to interested parties, and make sure your website contains a visible disclaimer that no enforceable contract will be created until all material terms are agreed to and a separate, formal, written agreement is executed by the parties.
2. Make it clear this is not a contract. If you plan to market a specific property via social media and have a limited number of characters at your disposal, consider adding a brief disclaimer at the end of your message, such as *NOT A CONTRACT*. This may be prudent if you are communicating directly with one person, as opposed to your larger social network.
3. Coordinate with your brokers and agents. If your broker or agent plans to use social media to market a property, discuss guidelines and disclaimers ahead of time. Remember, brokers and agents with authority to act can create an enforceable contract on your behalf. ◆

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IN THIS ISSUE:

Breaking Your Lease

First published in *Medical Office Today*, an online publication available at www.medicalofficetoday.com. and reprinted with the publisher's permission.
(Readers, take note: While this article is focused on medical office space, the same legal principles apply to commercial real estate leases generally.)

Are you thinking about closing your medical office before your lease has expired? There may be a number of business reasons to close the office: perhaps the location no longer is financially viable; perhaps you want your office closer to an affiliate hospital; or perhaps you're planning to grow your patient base in another location.

No matter how logical the reason, if your existing lease has not expired – and before you stop paying rent or close the office – review your lease agreement and check with your real estate attorney to understand the legal consequences of unilaterally terminating your lease.

When a tenant stops paying rent or abandons leased premises during the term of a lease, the tenant generally is considered in breach of the lease and is responsible to the landlord for damages caused by the breach (unless the landlord is already in default). The amount of damages, as well as the landlord's duty to mitigate (or minimize) its damages,

varies depending on both the express terms of the lease and the laws of the state where the property is located.

In a majority of states, when a tenant defaults on its lease, the landlord is required to mitigate its damages and has a legal incentive to re-rent the leased space to a replacement tenant.

In a handful of states (New York, for example), the landlord is not required to mitigate its damages when a tenant defaults on its lease and has no legal motivation to re-rent the leased space until the expiration of the lease. Instead, the tenant and any personal guarantor will remain responsible for all rents due during the remainder of the term of the lease. In the medical office context, this result can be onerous not only for a medical practice, but also for any physician that has provided a personal guarantee.

Check your lease agreement

If you are looking to terminate your lease in the middle of the lease's term, check your lease agreement to see if you have an early termination right. Often, tenants (and their brokers and attorneys) will negotiate an express right to terminate the lease by giving the landlord prior written notice and payment of a termination fee.

Negotiate a surrender agreement

If no early termination right exists, consider negotiating a surrender agreement with the landlord. Depending on market circumstances, for a fee, the landlord may agree to the surrender of medical office space prior to the expiration of the lease term. A surrender is affected with the consent of the landlord, and it cuts off the tenant's obligation to pay future rent from the time of surrender.

Assist in the re-leasing of space

If a surrender agreement is not practical, and your office is located in a state where the landlord is required to mitigate damages following a tenant default, consider finding and presenting to the landlord qualified applicants who are prepared to re-lease the office space.

If the landlord accepts one of the applicants, your responsibility for damages will be reduced. If the applicant is willing to pay at least the same rent, your responsibility for damages will be reduced even more.

On the other hand, if the landlord rejects all of the proposed applicants, you may claim that the landlord failed to mitigate its damages despite the fact that qualified replacement tenants were ready, willing and able to move in and commence paying rent.

Negotiate ahead of time

When negotiating a new lease for medical office space, there are a couple of steps a tenant can take to allow greater certainty as to the consequences of an early termination. First and foremost, to avoid a default altogether, tenants can negotiate an early termination right.

In addition, tenants can negotiate a provision requiring the landlord to mitigate its losses in the event of a tenant default and to use commercially reasonable efforts to re-lease the office space. This clause can require, among other things, the landlord to employ a commercial real estate broker to find a replacement tenant and to attempt to re-rent the premises for at least the same rent.

The legal consequences of unilaterally terminating an unexpired lease can be severe for the tenant and the tenant's guarantors. Review your lease agreement and check with your real estate attorney before you unilaterally stop paying rent or close a medical office. ◆

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Time to Refinance in 2012? Challenges Ahead for Landlords and Tenants

Remember the frenetic rush to obtain commercial real estate financing in 2007? Over $55 billion of commercial mortgage-backed securities (CMBS) loans made in 2007 mature in 2012, and as much as 60% of those 2007 vintage five-year loans may fail to refinance, according to Standard & Poors (S&P). S&P analyst Larry Kay forecasts in his December 2011 report that CMBS borrowers will be challenged to refinance in 2012 due to the number of property loans with high loan-to-value (LTV) ratios, borrowers' limited equity in their buildings, limited amortization, and tighter lending conditions. According to S&P, lenders are willing to write a mortgage loan for a maximum of 70% of a building's value in this market, and over half of the 2007 vintage five year CMBS loans have loan-to-value (LTV) ratios of 70% or greater.

The refinancing challenge is not unique to CMBS loans; it is expected to affect all types of commercial real estate loans. Many property owners may try to extend their maturing loans instead of refinancing. If a property is cash-flowing, and a lender wants to maintain a good customer relationship, a lender may be willing to extend, so long as the borrower has enough equity in the property to deal with tenant rollover. Nonetheless, not every loan will be refinanced or extended, and a maturity default could have serious consequences for tenants.

If you are about to sign a lease, be sure to inquire about your landlord's secured debt and to ask for "non-disturbance."

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Ask for Non-Disturbance

When a lender forecloses on a deed of trust, as a general rule, all subordinated leases are terminated. Early termination can be harmful to your business if, for example, the space is particularly valuable, or you have a substantial investment in improvements that will be lost upon termination.

You can protect your lease from early termination by requesting "non-disturbance" from your landlord's lender. When non-disturbance is granted, if the lender forecloses and steps into the shoes of the landlord, the lender agrees not to disturb your right, as tenant, to possession as long as you are not in default under your lease obligations.

If your landlord is giving you a tenant allowance, consider your landlord's financial health.

Non-disturbance can appear in your lease. It also can be part of a separate subordination, non-disturbance agreement (an "SNDA") between you, as tenant, and the lender. In an SNDA, a tenant agrees to subordinate its rights, as tenant, to the rights of existing and future lenders so long as following a foreclosure, the tenant's right to possession will continue if the tenant is not in default. As a general rule, a non-disturbance provision in a lease will be effective against all future lenders (but not existing lenders), while a non-disturbance provision in a separate SNDA will be effective against an existing lender.

Depending on your size and bargaining position, you may be able to negotiate non-disturbance in your lease and insist upon a separate SNDA as a condition to signing your lease. Alternatively, the landlord may add non-disturbance to your lease, but only agree to use commercially reasonable efforts to obtain a separate SNDA.

Verify Your Landlord's Secured Debt

If your landlord is giving you a tenant allowance, consider your landlord's financial health. Will your landlord be able to reimburse you for tenant improvements? Perform diligence on your landlord's outstanding debt secured by the property. Will any secured debt mature in the near term? What are the landlord's prospects of refinancing? While a foreclosing lender may agree "not to disturb" your possession, as tenant, a lender likely will not honor all of the defaulting landlord's obligations under your lease. In particular, a lender may not agree to fulfill any obligations to fund tenant improvement allowances, moving costs or similar expenses, a lender may not recognize expansion rights, extension rights, or similar rights, and a lender may disclaim all responsibility for pre-foreclosure defaults.

The refinancing challenges ahead in 2012 may affect property owners and their tenants. Prospective tenants can protect their interests by negotiating for "non-disturbance" and performing diligence on their landlord's secured debt before signing their lease. ◆

FIRM NEWS

Happy Anniversary!
Law Offices of J.J. Sherman, P.C. celebrated its second-year anniversary on October 12, 2011.

Firm Expansion!
We actively are working with clients doing business in California and are expanding our practice into the Washington, D.C. market in order to cater to clients doing business on the East Coast.

Commercial Real Estate Women!
Law Offices of J.J. Sherman, P.C. is proud to serve as a 2012 Sponsor of CREW-LA and a 2012 Sponsor of CREW DC. ◆

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Copyright Update

On January 18, 2012, the United States Supreme Court in *Golan v. Holder* upheld a 1994 amendment to the U.S. copyright laws that restored copyright protection to foreign works that had entered the public domain in the United States. The 1994 amendment applied mainly to preexisting works first published abroad from 1923 to 1989. *The New York Times* reports the "precise number of affected works is unknown but probably number in the millions." According to *The New York Times*, notable works that benefited from copyright restoration include films by Alfred Hitchcock, books by C.S. Lewis and Virginia Woolf, symphonies by Prokofiev and Stravinsky and paintings by Picasso.

The decision in *Golan v. Holder* is considered an important victory for creators and their copyrights.

Congress passed the 1994 Amendment to comply with an international convention which requires each signatory to provide the same copyright protections to authors in other member countries that it provides to its own members. The amendment was first challenged in 2001 by orchestra conductors, musicians, publishers and others who formerly enjoyed free access to these foreign works in the United States.

Upholding the 1994 amendment, Justice Ginsburg, writing for the majority, stated that the 1994 Amendment "does not exceed Congress' authority under the Copyright Clause" and "the text of the Copyright Clause does not exclude application of copyright protection to works in the public domain." She added the law had merely put "foreign works in the position they would have occupied if the current copyright regime had been in effect when those works were created and first published."

The decision in *Golan v. Holder* is considered an important victory for creators and their copyrights. On the other hand, after *Golan v. Holder*, performers and other consumers of restored, foreign works – like Prokofiev's *Peter and the Wolf* – must budget royalties into their performance and publication costs. ◆