

Enforceability of At Will Lease Termination Provisions by Anthony J. Vizzoni, Esq.

As a commercial tenant, are you concerned about being in the untenable position in which a prospective landlord requests the right to terminate your commercial lease at his or her sole whim and discretion? Most times, the landlord in such a situation appears to have superior bargaining

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power because the property is so uniquely located and ideally suited for the commercial tenant's business, even so that the tenant cannot lease similar commercial space elsewhere. This may be the case where the tenant is seeking to lease property in a port location under the jurisdiction of a public port authority and the tenant must be located within the port location to run its operations. Examples include businesses such as trucking companies transporting goods in and out of the port destination or airline meal preparation companies that must be located close to airports.

When a landlord exercises the right to terminate a commercial lease, the tenant may not necessarily be without recourse. New Jersey law is well established in the principal that in each contract, there is an implied duty of good faith and fair dealing between the parties. This principal of good faith and fair dealing, which arises in common law, imposes upon the parties, to any contract, an obligation to refrain from doing anything which, in effect, destroys or injures the right of the other party to receive the benefits of the contract.

If the landlord has the absolute at will right to terminate a lease interest, and the landlord exercises that right, the landlord may have violated the covenant of good faith and fair dealing. This may be true even though the landlord does not necessarily violate an express term of the lease. A vital consideration as to whether the tenant may be entitled to relief under the covenant of good faith and fair dealing is whether the tenant's reasonable expectations as to the leasehold term are destroyed when the landlord acts without any legitimate purpose in terminating the lease. Even if the right is bilateral so that the tenant retains the same right of at will termination of the lease, this may have no effect on a breach of good faith and fair dealing covenants when the landlord terminates without cause.

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About the Author

Anthony Vizzoni serves as Of Counsel to the firm and has spent his entire career in real estate, both as a lawyer and real estate developer. Prior to joining the firm, he served as Corporate Counsel to the Vizzoni group, a well-respected real estate development firm.

As Corporate Counsel, he gained vast experience in all aspects of real estate law and a particular proficiency in handling transactions related to land acquisition and sales, real estate financing, commercial leasing and construction.

Anthony is also a member of the Becker Meisel Business Services Group and represents various tenants and landlords throughout New Jersey.

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At Will Lease Termination Provisions *continued...*

New Jersey courts will construe the lease in a manner consistent with the true intent and purpose of the tenant and landlord.

The reasonable expectations of the parties, not only by the contents of the lease but by the whole relationship that existed between the landlord and the tenant, will be examined. In addition to the parties' reasonable expectations, other key factors as to whether the landlord could terminate the lease without cause would include (i) the history of the relationship between the landlord and the tenant; (ii) their respective bargaining positions; and (iii) their course of conduct over an extended period of time.

Public interest considerations also play a significant role in these situations. Although courts recognize that they should not restrict the freedom of parties to contract, New Jersey courts have shown that they are willing to invalidate unconscionable contract provisions that tend to hurt the public in some way. In our example above using the trucking company's need to be located in a port destination, the ability to move goods in and out of a port destination that receives and delivers goods from all over the world certainly merits public interests considerations.

In sum, even with an express provision in the lease to the contrary, a landlord cannot terminate a leasehold interest at whim without, at minimum, a showing of good cause, such as a failure by the tenant to substantially perform its obligations under the lease.

For more information about at will lease terminations, contact Anthony J. Vizzoni at 973-422-1100.