

Audits of Silent Leases

By Robert A. Machson

Rarely do lawyers make any definitive statements, but this one I can make: **a tenant may audit its additional rent charges if its lease is silent on the right to audit.** How can I be so sure? First, the case law says so. Second, my experience bears it out. I have never come across a landlord that will not permit an audit when its lease is "silent."

The legal case is quite clear. A lease, like any other contract, must be read as a whole, giving meaning to all its terms. A typical center or strip lease requires a tenant to pay its pro rata share of estimated costs at least one year in advance. At the end of the year, the landlord is required to provide "a statement in reasonable detail setting forth the computation of such total costs and expenses." From that statement, an adjustment of future payments is made based upon on the tenant's previous under- or overpayments.

If the tenant were prohibited from auditing the statement of total costs and expenses the provision requiring its provision by the landlord would have no effect and be mere surplusage. Such an interpretation runs afoul of the common law's construction of contracts so as to give reasonable effect to each of the contract's provisions. Thus, when faced with a contract provision for which there is no explicit right or remedy, the Courts are likely to imply such a remedy in order to "give [it]



reasonable effect." *J.A. Sullivan Corporation v. Commonwealth*, 397 Mass. 789 (1986).

Even if there were no requirement that the statement be provided "in reasonable detail," courts are still likely to permit audits based upon the landlord's right to estimate costs in advance and bill them to its tenants without their prior approval. The best-known case on point is *P.V. Properties Inc. v. Rock Creek Village Assoc. Ltd. Partnership*, 549 A.2d 403 (Md. App. 1988), in which the court held that the relationship that permitted the landlord to estimate and bill for costs in advance was a fiduciary one, therefore requiring the landlord to provide an accounting of its operating cost charges.

However, if you need to overcome the fine points (and the legalese) of the contract interpretation and fiduciary duty

argument, there is a far simpler way to make your point — if you are ready to make it. If the landlord does not want to provide you with your audit in response to your letter, it will be required to do so in response to our summons and complaint. This point has proved very effective.

The argument should be made as follows. A party's rights to recovery for contract damages can only be limited when expressly provided in the contract. Thus, unless the tenant has agreed to some contractual limitation of its right to audit, such as limiting it to audit a certain number of years after receipt of the reconciliation, the tenant's common law remedies remain available. See *Pizzeria Uno of Kingston, Inc. et. Al. V. Independence Mall Group, et.al.*, 1995 WL 419932 (Mass. Super. 7/13/95). Where the lease is silent as to a tenant's right to audit, the courts (and the landlord in the above case) agree that the right of recovery, and therefore, to audit — is limited only by the applicable

The legal case is quite clear. A lease, like any other contract, must be read as a whole, giving meaning to all its terms.

statute of limitations (for example, six years in Massachusetts, New York, New Jersey, and fifteen years in Ohio!, for breach of contract).

Thus, when landlords typically refer to audit "rights" in a lease, they are actually referring to audit limitations. The right to audit is implied in the contract, in the common law, and in the common law remedies for breach of contract.

Thus, you may suggest to the landlord (in the immortal words of Tina Turner), we can do it easy, or we can do it rough. Either provide us our audit documents voluntarily on your (reasonable) timetable, or provide them by court-ordered discovery. Either way, the result will be the same.

About the Author



Robert A. Machson of Robert A. Machson & Associates, a law firm representing tenants in all aspects of the real estate relationship, including cost audits. Mr. Machson can be reached at 212-753-0599 or at RMLAW@aol.com.