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Commercial Leasing

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Due Diligence In Distressed Community Hospitals

By Deborah Williamson, Mark Andrews and Richard Y. Cheng

A "community hospital" is generally located in a smaller town but can also include urban facilities that serve a market segment distinct from a major teaching hospital. A community hospital is generally not-for-profit and historically not affiliated with a larger system. Many community hospitals are in distress. The causes are varied but have a constant theme — the cost to adapt to a rapidly changing environment. Potential investors in distressed community hospitals will similarly need to be nimble in their due diligence.

What Is the Patient Population?

Initially, customer-based due diligence appears standard. Is the current customer base increasing or decreasing? Can the customer base be expanded? With hospitals, there are additional concerns. Is the population served by the hospital increasing or decreasing in age? Is the market segment growing or shrinking? Is there any future event that would change the demographics?

There are also questions unique to community hospitals. The Emergency Medical Treatment and Active Labor Act (EMTALA) requires hospitals to treat any patient who stumbles

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A Little Knowledge Goes a Long Way: A High-Level Overview of Liability Insurance Provisions in a Retail Lease Agreement

By Lisa A. Weixelman and Amber J. Simon

Some of the most overlooked sections in a lease for a retail shopping center are the insurance provisions. Even experienced asset managers and general counsel often have a number of questions surrounding insurance provisions in shopping center leases. Despite their seemingly lackluster nature, well-drafted insurance provisions in a contract between a landlord and tenant can be extremely important when it comes to mitigating potential exposure and protecting a shopping center's assets.

Required Coverage

Nearly every shopping center lease agreement contains provisions requiring the tenant to procure and maintain liability insurance for itself continuously throughout the term of the agreement. There is significant protection for a landlord in having its retail tenants bound by lease provisions that require the tenants to maintain insurance coverage for themselves.

It is prudent for a landlord to spell out each type of insurance coverage it requires its retail tenant to maintain. First and foremost, a landlord has an interest in making sure its tenant has commercial general liability insurance that will cover both bodily injury and property damage. If a customer injured while on the tenant's premises is compensated by the tenant's policy, this reduces the exposure for a claim against the property owner.

Many leases further require the retail tenant to maintain workers' compensation insurance to the full extent required by the applicable law; employer's liability insurance; automobile liability insurance; excess insurance coverage; and even comprehensive cyber liability insurance (as more landlords and tenants are incorporating technology into everyday use). By requiring a retail tenant to

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insure itself, the landlord is making sure the tenant has protection in the event it is sued and will not necessarily face financial hardship that may negatively affect the tenant's ability to pay rent.

In addition to the types of coverage, it is standard that the lease agreement specifies the minimum coverage limits a retail tenant must maintain. For example, a lease may require the tenant to carry commercial general liability insurance of not less than $1 million per occurrence and in the aggregate, and additionally require that the tenant also purchase insurance coverage in excess of the underlying liability insurance requirements. The minimum amount of coverage a property owner should require depends upon the potential exposure. The landlord should evaluate what kind of exposure it may face in order to determine the minimum amount of coverage the landlord should require of the retail tenant. The landlord's insurance broker is often a good resource for determining appropriate limits.

Finally, a savvy retail tenant often asks that the insurance requirement be reciprocal, so that the landlord is required to maintain insurance coverage in the same minimum amounts. This ensures that the landlord has its own coverage in the event both the landlord and tenant are named as parties in a suit.

Additional Insured Provisions

In addition to requiring a tenant to maintain insurance for itself, a well-drafted lease agreement will also require that the tenant make the landlord an additional insured on its policies — most importantly the commercial general liability policy.

When a landlord leases space to a tenant, the landlord bears a risk that someone could be injured on the rented property while visiting the tenant. If the injured party sues the shopping center owner, the landlord (or its insurer) might be liable for damages. Standard additional insured provisions will cover the landlord under the tenant's policy for any liability the landlord faces that is derivative of the negligence of the named tenant. Because coverage as an additional insured is derivative of the tenant's negligence, it is critical that the landlord maintain its own liability coverage as lessor regardless of the insurance maintained by the enant.

If a shopping center has coverage as an additional insured, and subsequently, the shopping center faces potential exposure that may arguably be derived from the tenant's negligence, the shopping center should notify the carrier to take advantage of the additional insurance coverage. In a lawsuit, in addition to the shopping center's obligation to disclose its own insurance coverage, the shopping center may also have an obligation to disclose coverage as an additional insured. Either way, view that coverage as an asset, and do not let it be forgotten.

Waiver of Subrogation

A waiver of subrogation provision is one of the most misunderstood, yet critical, provisions in a commercial lease — and one that is mutually beneficial for both the landlord and the tenant. When one party pays a claim that is caused by another, that party is entitled to seek recovery of the amount paid from the other party. In the context of insurance, if the insurer pays a claim on behalf of its insured, it acquires the insured's right to seek recovery from the responsible third party. Waivers of subrogation in lease agreements are often reciprocal and each party agrees to give up subrogation rights against the other in the event of a loss.

The purpose is to prevent one party's insurance company from

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The Gold Rush of NJ Cannabis Leasing

Avoiding a Few Traps For the Unwary

By Brad A. Molotsky

It has now been over a month since the pell-mell months of July and August, when we had 13 leases, two options and multiple letters of intent to negotiate, finalize, execute or terminate for various clients in the span of a few weeks in connection with their applications for medical cannabis licensure in the state of New Jersey.

During this past summer, New Jersey decided to double the number of medical cannabis licenses from six to 12. Existing license holders were not eligible to apply for new licenses in this round. New applicants had essentially six weeks to compile a licensure application, file the required licensure fee and paperwork, and submit their no-more-than-300-page application. Since the licensure was for both growing cannabis and the distribution of medical cannabis, the application included various background checks, qualifications and submissions intended to show that the applicant had the necessary business knowledge, financial capability and growing and distribution ability.

Over 825 potential applicants arrived for a mandatory meeting of interested parties in June 2018, which ultimately resulted in 146 actual applications being filed on August 31 (51 in southern New Jersey, 50 in northern New Jersey, and 45 in central New Jersey) for six available licenses. As of August 1, there were over 28,500 approved medical cannabis patients in New Jersey, up from 10,000 in 2016.

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Interestingly, the applications called for a tiebreaker, which indicates that site control of a leased or owned site and a letter from the applicable municipality showing support for the given use from the mayor or town council will be taken into consideration as a tiebreaker. This tiebreaker is what led some applicants to span the state, engage brokers or canvas the markets on their own, and attempt to line up and negotiate and sign leases for their sites. Licenses were to be granted with two grow-and-dispense licenses in the north, two in the central region, and two in the south, with winners announced in the beginning of November 2018.

The leases were intended to be for either:

1. Grow facilities-likely 75,000 to 100,000 square feet to grow product in; or
2. Dispensaries-approximately 2,500 square feet to dispense medical cannabis.

It should be noted that site control needed to be demonstrated for both types of facilities as applicants needed to show ability to control both within a particular region.

Considerations

Particular issues that arose within the leasing context included landlords that were generally unfamiliar with the landscape of cannabis, requiring a lot of up-front education of their brokerage team, their legal team and the landlord themselves that had to occur in a relatively short period of time. Issues included the following, as well as many others:

1. ***The law.*** Interplay of federal law under the Controlled Substances Act and state law permitting medical cannabis.
2. ***Rent.*** Use of cash to pay rent versus check or wire transfer due to federal banking issues and inability to use federal banking system.
3. ***Security deposit.*** Whether the applicant had to pay a security deposit up front with the signing of the lease that was refundable if they did not get a license. Remember only six licenses will be granted in November, so many who signed leases will be cancelling them. Whether the deposit is refundable became a bit of a hotly debated topic as time began to wear on.
4. ***Prepaid rent.*** How much rent was prepaid (setting aside bankruptcy concerns regarding prepayment of rent) and whether it was refundable or applicable if the applicant got its license was a hotly debated topic.
5. ***Cost per square foot.*** The amount of rent charged also became a very variable thing as landlords began to realize and exact certain things from potential applicants. Rental rates began to bear limited relation to market pricing in certain markets where towns had indicated a willingness to sign letters in support of either grow or dispensary licenses.
6. ***Capital repairs.*** Normal market norms of who typically pays for capital repairs and replacements also became the subject of unusual conversations as leverage started to shift, given short time periods and desires to have deals signed for applications.
7. ***Security.*** Given that many dispensaries can only collect payment for goods sold in cash, additional focus on site security and how one delivers product and how one removes cash on site needed extra attention that many landlords were not well-versed enough to initially understand or focus on.
8. ***Risk of forfeiture and compliance with law covenants.*** The federal risk of forfeiture and the interplay with a lender and mortgage covenants are areas many novice landlords are not well-versed in, and language requiring the applicant to "comply with all applicable

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laws" can create trip hazards for the unwary given that federal law noted above will be breached on day one. Thus, language needs to be added to address these situations and appropriately allocate these risks among the parties, rather than ignore them.

9. ***Odors and waste.*** While most leases will not permit onsite sampling or smoking, landlords will want to pay particular attention to clauses that implicate this type of activity to make sure that there is an appropriate allocation of risk and ability to enforce any odor-type provisions. Applicants will want to make sure the provision is not too loose to allow adjacent tenants to create an issue for them with the landlord.
10. ***Exclusive use.*** Both the landlord and the applicant (but mostly the applicant) will want to ensure that no one else is doing what the applicant intends to do onsite from a legal and licensing perspective, but also from a covenants perspective-noting that drug stores, convenience stores, food stores, holistic healing and spas might have language in their leases that could implicate some of the uses that a dispensary might engage in, so care in drafting is very important here.
11. ***Purchase options.*** Because of the potential for escalating rents given the use, applicants have asked for, and in some cases been granted, the right to buy certain facilities that are more stand alone in nature, from landlords. Given the use and the value creation potential, this is worthy of consideration when doing one of these transactions.
12. ***Termination clauses.*** The ability of the applicant to terminate the lease if it is unsuccessful in procuring a license, or if it loses its license, or to expand its business if its license becomes permissible for adult-use, is a critical topic for the lease from the applicant's perspective. The landlord will be more focused on the ability to terminate the lease if it is reasonably concerned regarding a federal forfeiture action by the DEA or other governmental authority and how that might become operative where the landlord could legally lose its property.

Analysis

In this ever-evolving space, where 30 states have permitted medical cannabis and nine states have permitted adult-use cannabis, there are many more issues of note that are beyond the scope of this article that come into play in a lease tailored to cannabis dispensing or grow facilities. The goal of this article is to sensitize the reader to the notion that these types of leases are not "business as usual," and that they have their own nuances that should be taken into consideration when drafting and negotiating this type of deal. While cannabis leasing is not the equivalent of splitting the atom by any stretch, it does come with its share of key legal and business considerations that need attention-or they can become traps for the unwary.

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pursuing a lawsuit against the other party to the lease agreement after it has paid on a claim. The inclusion of a waiver of subrogation clause in a lease is beneficial because it can prevent potentially expensive and time-consuming litigation after the loss. For instance, imagine a scenario in which a customer trips and falls due to defective flooring in a tenant's leased space. The customer sues the landlord, who makes a claim on its insurance, and the insurer defends the claim and pays a settlement on the landlord's behalf. Without a waiver of subrogation, the landlord's insurance company may be able to sue the tenant in an effort to recover the monies paid on behalf of the landlord. Such a suit could be detrimental to the tenant's financial viability, which would be harmful to a landlord who depends on the tenant to pay rent.

Conversely, if a landlord's negligence causes the customer to slip and fall, and the tenant is sued, a waiver of subrogation stops the tenant's insurance company from suing the landlord after having paid the claim on behalf of the tenant. If the landlord loses, they might raise the rent to cover the additional cost. As a result, the waiver of subrogation can be beneficial to both parties. It does not limit the amount of insurance proceeds available; it limits the insurance company's ability to pursue the party with whom you have entered into a lease agreement.

Most general liability insurance policies contain cooperation provisions that prevent the insured from doing anything that will impair the insurer's ability to recover. However, most policies provide that a written waiver of subrogation, agreed to in advance of a claim, is not a violation of the policy. Be sure to check your policy before agreeing to a waiver of subrogation.

The Certificate of Insurance

It is prudent to require that the party with the obligation to maintain insurance or to add the other party as an additional insured prove that they did indeed do so. The landlord typically asks that the tenant provide a certificate of insurance (COI) indicating that they are maintaining each of the policies required under the terms of the lease. It is important to understand that

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into an emergency room regardless of insurance status or ability to pay. If admitted, a patient can't be transferred unless accepted by another facility or discharged by a physician. An understanding of the percentage of uninsured patients is critical. Less obvious is a determination of the percentage of unpaid claims attributable to under-insured patients who cannot to pay their deductibles.

Medicare provides a Disproportionate Share Hospital Adjustment (DSH) for hospitals that serve a significantly disproportionate share of low-income patients. The Affordable Care Act assumed that DSH hospitals would have a newly insured population and significantly reduced DSH payments. Unfortunately for many community hospitals, the uninsured population was joined by the under-insured population, with decreased Medicare payments, and regulations, which are being revised.

What Is the Projected CAPEX?

Again, it begins with standard due diligence. Does the physical plant need improvements? Is there deferred maintenance? Would additional investments improve performance? In healthcare, regulatory changes, technological advances and new forms of competition may all affect CAPEX requirements.

Standard diligence should consider the implementation of EHR/EMR. Electronic Medical Records (EMR) are digital versions of a patient's paper chart used within a single health care provider. An EMR system is built to go beyond standard clinical data collected in a provider's office and include broader view of a patient's care. Electronic Health Records (EHR) are individual health records which are shared among multiple facilities and agencies, and generally aren't a hospital focus. Not only must the hospital pay for any physical hardware and/or software, it must also expend funds for setup, maintenance, training, IT support and system updates. Cost alone may prohibit proper implementation.

There is a strong push toward "value-based payment models." The goal of value-based programs is to link performance of quality measures to provider payment. Factors include reducing hospital readmissions, using certified health IT, and improving preventative care. The Department of Health & Human Services (HHS) set a goal of converting 50% of fee-for-service Medicare payments to value-based payment models by the end of 2018. Value-based payment models mandate that health care providers invest in technology and other capital improvements to increase efficiency and improve patient outcome.

Cash Flow Hurdles

Healthcare organizations track ("capture") a patient's use of hospital resources, including equipment, medical supplies, diagnostic testing, medication and hospital staff. These charges are then billed to patients and third-party payers. The process behind "charge capture" can be complex and distressed entities may fail to have systems which completely and correctly capture all charges.

Medicare payments are unique and can re-open claims for four years. The federal government has the right to "recoup" any overpayments from current payments. As a general rule, courts cannot enjoin the exercise of recoupment. In *Family Rehabilitation, Inc. v. Azar*, __F.3d__ (5th Cir. 2018), the Fifth Circuit recognized a narrow exception, holding jurisdiction existed to enjoin Medicare recoupment during the administrative appeal process. A significant factor was the two- to five-year backlog of cases in the appellate process.

Regulatory and Compliance Reviews

Given the highly regulated nature of hospitals, identifying regulatory and compliance issues is critical. The potential risks and liabilities imposed can be significant, resulting in detrimental impact long after the closing of a transaction.

There are numerous laws that could be implicated, but the "big four" set the stage — Anti-Kickback Statute (AKS), Stark Law (Stark), False Claims Act (FCA) and Civil Monetary Penalties Law (CMPL).

AKS makes it a criminal offense to offer, pay, solicit or receive anything of value to induce or reward referrals of healthcare services or goods payable by a federal health care program. Reviewing key documents, including, but not limited to physician contracts, marketing service agreements, management service agreements and documents showing physician ownership in a related business entity can be critical to identifying potential AKS violations.

Stark prohibits a physician or immediate family member of a physicians from making referrals of "designated health services" payable by Medicare to any entity in which the physician or immediate family member has a financial relationship, unless an exception applies. Similar to AKS, it is necessary to review all physician and other related documents that create a financial relationship, including, but not limited to, professional services agreements involving the physician, physician employment agreements, along with documents which relate physician ownership of business that is deemed a designated health service.

The FCA prohibits individuals from knowingly presenting or causing to be presented a false or fraudulent claim. It is both a stand-alone statute for inappropriate billing practices (*e.g.*, submitting false claims to the federal government), and relevant if AKS is violated. The CMPL often goes hand-in-hand with the FCA.

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It is a tool for the federal government to implement additional penalties for inappropriate conduct including submitting false claims, providing for services beyond medical necessity or breaching Medicare conditions of participation. In recent years, the concept of "reverse FCA" violations are being explored by the federal government, *e.g.*, if a hospital fails to return an identified overpayment within 60 days. Throughout due diligence, evaluating collection and claims processes and procedures will be vital. If questionable billing or collection practices are identified, initiating a billing and coding audit by an independent third party may be appropriate.

Beyond the "big four" issues, the potential investor should consider ancillary issues including HIPAA practices, licensing and certificate and corporate practice of medicine (CPOM). CPOM jurisdictions restrict employment of physicians by non-physicians. Any arrangement where non-physicians have financial stakes or are in a position to dictate physician clinical decisions should be identified. HIPAA policies, business associate agreements, pending corrective actions and enforcement actions by HHS Office of Civil Rights should also be addressed. It will be critical to identify change of ownership restrictions and timeframes for applicable licenses and certificates, along with the history of citations or penalties associated with licenses and/or certificates. If regulatory violations have been identified, self-disclosure and a resolution with the government may be an option.

Governmental Claims

Police and regulatory powers are not stayed even in a bankruptcy. A transfer of a hospital is generally accompanied by the Medicare and Medicaid Provider Agreement, with attendant successor liability for government claims. Due diligence requires a determination whether there are any ongoing state or federal investigations.

A *qui tam* lawsuit is one brought by a private citizen (popularly called a "whistle blower") against a person or company believed to have violated the law in the performance of a contract with the government or a government regulation. In a *qui tam* action, the plaintiff will be entitled to a percentage of the ultimate payment as a reward for exposing the wrongdoing and recovering funds for the government. The government can intervene and become a party to the suit in order to be part of any negotiations and conduct of the case. *Qui tam* litigation can be pursued, even if the government declines to prosecute. In 2018, the DOJ issued a memorandum re-urging its attorneys to seek dismissal of "meritless" *qui tam* litigation over the objection of the realtor. It remains to be seen if this or other actions put a damper on such claims.

Opportunities

Many hospitals and other providers are attempting to increase revenues by providing additional services (*e.g.*, home health care, long-term care or rehabilitation). The value-based payment model favors this horizontal integration. The economies of scale for larger systems are significant, and capital-constrained hospitals and hospital systems have struggled to keep up.

Can a "walk in" or outpatient facility adjacent to the hospital be created? These facilities are more efficient at dealing with the minor cuts and scrapes, sniffles, sneezes, flu, and the like. They also keep patients out of the emergency room. More importantly, there is a better payor mix, as patients pay upfront to the extent the facility is not bound by the EMTLA. They can also be a feeder for hospital system.

Exit Issues

If a sale is anticipated, will there be approval issues? Certificate of Need (CON) programs regulate the number of beds in hospitals.

Is the hospital owned by a hospital district? If so, what additional consents would be required to consummate the transaction? In a non-profit, the attorney general acts as the "equity," serving the public's interest and must consent to a sale to a "for-profit" entity. The degree of activity by any attorney general depends on the size of the facility and approach taken by each state.

Is there a regional reconfiguration plan? A regional reconfiguration plan is a deliberately induced, non-trivial change in the distribution of services that are available in each hospital or other secondary or tertiary acute care unit in a locality, region or health care administrative area. They are more common in states with CON requirements. If one exists, will that impact projected revenues, CAPEX and other issues? Are there interim funding sources from a governmental entity?

If the exit includes closing of a hospital, due diligence takes on another dimension. Questions to be asked include:

- Is there a pharmacy? If so, is it owned by the facility or operated by a third party?
- Is there a fragile patient population? If so, how long will it take to transfer all patients? How long will it take to stop admitting new patients?
- Is there an emergency room? If so, what is the process for diversion?
- Is there leased equipment? Can the equipment be moved?
- Who will take responsibility for the patient records? What is the cost for storage of records? Who will notify former patients regarding the location of their records?
- Are there land use restrictions? Can any restrictions be easily modified?
- Will the property need to be re-zoned?

Conclusion

There will always be a need for well-run community hospitals. Through due diligence, a distressed community hospital can become a viable investment. Failure to identify and address the issues unique to community hospitals can lead to interminable buyer's remorse.

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CASE NOTES

Two Lawsuits, No Collateral Estoppel

The District Court of Nassau County, NY, has held that although a landlord was ordered to sell her commercial property to her tenant in accordance with the terms of the parties' lease, the tenant was not entitled to summary dismissal of the landlord's second suit seeking unpaid rent, as the rent claims were for amounts due post-decision and they were not raised or addressed in the prior lawsuit. *Carter v. 126 Henry St. Inc.*, NYLJ, DOI; Pg. 29; Vol. 260, No. 56.

Landlord Betty Cator leased a commercial property in Hempstead, NY, to 126 Henry Sreet Inc., which does business as Village Auto Clinic (Village Auto). Village Auto commenced an action in Nassau County Supreme Court alleging breach of the lease and seeking specific performance of Cater's agreement to sell the property to Village Auto. Cater brought a second suit in response, in which she claimed that Village Auto had not paid its contractually agreed rent. The two lawsuits were joined for trail in Nassau County Supreme Court in March of 2015.

By June of 2015 the matter was still dragging because Cater's attorney was no longer on the case. The court therefore stayed the proceeding for 60 days but also gave Cater a warning that if she failed to appear for the next scheduled conference a default judgment would be entered against her. The court was more generous than that, waiting until Cater had failed to appear three times before entering default judgment for Village Auto by granting it the order for specific performance of the sale contract, to be performed within 90 days of the order. The court simply dismissed the non-payment-of-rent portion of the suit.

Cater appealed the judgment, and that appeal is still pending, so the sale of the property remains in limbo. Meanwhile, Cater brought a brand new summary proceeding – the one at issue in the case under discussion here — seeking rental arrears of $319,200 dating back to 2011. Village Auto countered with a motion for dismissal on the basis that it believed Cater was collaterally estopped from relitigating the issues that had already been decided in the default judgment against her.

The court here, citing to *Matter of Abady*, 22 AD3d 71 (1st Dept. 2005), explained that the doctrine of collateral estoppel requires a showing of two things: 1) an identical issue having been decided in a prior action; and 2) that the party being precluded from bringing the second action had a full and fair opportunity to contest the prior determination. And, as further stated in *Abady*, while the matter must be actually litigated and determined in a prior action for collateral estoppel to apply, "[a]n issue is not actually litigated if 'there has been a default, a confession of liability, a failure to place a matter in issue by proper pleading or even because of a stipulation' (*quoting Kaufman v. Eli Lilly & Co.*, 65 NY2d 449 (1985))." But *Abady* also explained that there was one exception to this rule: Collateral estoppel may apply to a party who is not heard in the prior action *if that party deliberately refused* to defend or litigate the claim that is the subject of the preclusion request. Did this exception apply to Cater, the court asked?

In this case, the answer was no, because Cater had asked the Appellate Division for a stay of the order for specific performance of the sale and the court had granted that stay motion, so the matter was not finally decided. The question of rents to be paid while the appeal progressed was not addressed by the appellate court, yet Village Auto continued in possession of the property. So, while the rents due prior to the summary dismissal could not be newly adjudicated, those coming due post-dismissal could. "The facts demonstrate that Village Auto has occupied the premises without paying rent and for the taxes due. The document dated July 16, 2018, from the Office of Nassau Office Treasurer, states that $176,718.62 is owed for taxes. As such, the property is in danger of being sold for nonpayment of taxes," stated the court. The court noted that the landlord/tenant relationship continues until issuance of eviction, which terminates the tenant's obligation to pay rent (*see*, *Licini v. Graceland Florist Inc.*, 32 AD3d 825 (2d Dept. 2006); however, in this case no eviction had yet occurred. Because of this, the court determined that landlord Cater was entitled to collect rent to cover her expenses and it denied Village Auto's motion to dismiss her claim seeking such.

No Meeting of the Minds in Forged Lease

A New York court has found in favor of a landlord who sought his tenant's eviction after alleging that the tenant had materially altered the parties' lease without consent and had forged the landlord's initials purporting to show his agreement to the tenant using the property for commercial purposes. *Rufrano v. Yovino*, 2018 NY Slip Op 51251-2018.

Michael Yovino had rented the property in question on a month-to-month basis from Dr. Frederick Rufrano's aunt for many years. With the knowledge and consent of Rufrano and his aunt, the property had been used as a social club, and Yovino had sometimes held barbecues for the club's members in the yard. Over the years, the ownership and management of the property shifted from the aunt to Rufrano.

Unfortunately, an elderly club member suffered injuries while at the property. After he made a

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claim, Rufrano lost his insurance. In order to obtain new insurance, Rufrano had to change the term of the lease to a term of years and was further required to have the tenant carry insurance on the small commercial space naming Rufrano as the secondary insuree. Therefore, when entering into the seven-year lease that became the subject of this litigation, Rufrano included this insurance as a tenant requirement, writing of it in in large-block handwritten text on the first page of the document and in item 28 of the lease, which pertained to insurance.

The parties met and signed the lease, with Rufrano agreeing to a small change (concerning damages and the changing of lightbulbs) that was written in at Yovino's request. Rufrano testified that he initialed this one addition to the lease. Because there was no copy machine available and the tenant asked to keep a copy of the lease, Rufrano agreed to allow Yovino to keep the original with the proviso that he make a copy and send the lease to Rufrano. This never happened.

After entering into the lease, Yovino began using the property for a number of commercial purposes, including for throwing barbecues as a commercial venture. He also began amassing furniture and appliances on the property for the purpose of running a flea market. Rufrano then sought to evict his tenant, which Yovino alleged was not because he was using the property for non-agreed-upon purposes but because the landlord saw opportunities for obtaining more money by using the property in a different manner.

In court proceedings seeking eviction, the landlord claimed that the lease document had been altered without his consent. In fact, at some point, changes were made to the lease to indicate that Yovino had been granted permission to use a larger portion of the premises for commercial purposes. These changes were initialed, but Rufrano testified that the initials were not placed there by him and that he had not agreed to the changes. The court was therefore charged with deciding which party was telling the truth as to the changes that authorized commercial use of much of the property.

The court came down on Rufrano's side, noting that Yovino's testimony made no sense in several respects, including his assertion that the parties had agreed he could use much of the leased property for commercial purposes. The court stated, "Yovino's fixation on developing the yard for his various commercial ventures were at odds with the limited use that Rufrano and his aunt had allowed; *i.e.*, barbecues for the social club members. Given Yovino's's fixation on expanding his usage of the yard on lot 2, it is logical that he devised a scheme to get Rufrano to sign the lease twice, inform him he would subsequently mail him the original and then, after Rufrano left, obsessively add numerous clauses granting him the right to use the yard for commercial use. Had the parties actually agreed upon the commercial use of the premises, it would have been written once in clear bold letters on the first page of the lease." The court also credited Rufrano's handwriting expert's testimony that Rufrano's initials were forged over Yovino's expert's testimony to the contrary.

Because the court found that Yovino had unilaterally changed the terms of the lease and had forged three of four sets of initials therein, it also concluded that there had been no meeting of the minds, so that no agreement had actually been made. "Since no lease exists," stated the court, it granted Rufrano's request for a warrant of eviction and judgment of possession.

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the COI itself is not as meaningful as the policy. To the extent the party provides you with a COI, it is a representation that they have insurance coverage; however, the certificates themselves are for information only. A certificate is not a contract of insurance and does not change the policy terms. They are also drafted by insurance agents of the policyholder and not the insurer underwriting the risk. Therefore, a shopping center should approach a COI with caution and include a lease provision that allows it to obtain and review the actual policy itself.

Analysis

Navigating the complexities of insurance provisions in lengthy lease agreements can be challenging. In addition to understanding the insurance provisions in a shopping center lease agreement, it is always a good idea to consult your insurance broker and insurance counsel when reviewing or drafting such insurance provisions.

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