

## Commercial Property - USA

### Appellate Court Requires Strict Compliance with Terms of Lease Termination Option

August 22 2008

[Facts](#)  
[Decision](#)  
[Comment](#)

Generally, a tenant must strictly comply with the terms of an option to terminate a lease. A lease may grant a tenant an option to terminate the lease under certain circumstances in accordance with specified procedures, which might include timely notice and payment of a termination fee. In *Genesco, Inc v 33 North LaSalle Partners, LP*(1) an Illinois appellate court addressed whether a tenant is entitled to the benefit of its termination option where it failed to comply strictly with the notice requirements specified in the relevant documentation in exercising its termination option.

#### Facts

A tenant entered into a commercial lease with a property owner. The lease provided the tenant with a termination option. In order to exercise this termination option, the tenant was required to provide written notice and a termination fee to the landlord not later than the expiration date of the option, with time being of the essence. Under the lease, notice was deemed given two days after the date on which it was mailed, properly addressed to the landlord. After the lease was signed, the landlord assigned it to a new property owner. One day before the expiration of the termination option, the tenant's agent orally notified the landlord's agent that the tenant desired to exercise the termination option and that written notice, together with the termination fee, would be forthcoming. On the same day, the tenant erroneously sent a notice letter and a cheque to the wrong party and copied the previous landlord, but failed to address the correct landlord. After the erroneously notified party returned the cheque, the tenant contacted the landlord's property manager to determine where to send the termination fee. The tenant then sent a second cheque payable to both the previous landlord and the landlord's property manager, but again failed properly to address the landlord.

The lower court granted summary judgment in favour of the landlord on the basis that the tenant failed to comply with the terms of the parties' lease termination option, and that the tenant was not entitled to equitable relief.

#### Decision

On appeal, the tenant argued that despite its failure to strictly comply with the lease termination requirements:

- the lower court erred in failing to grant equitable relief where the tenant gave timely, oral notice;
- the tenant's non-compliance was trivial and not intentional;
- the tenant would suffer undue hardship as a result of the court's order; and
- the landlord had not suffered harm as a result of the tenant's non-compliance.

The appellate court held that the tenant did not strictly comply with the termination option when it mailed the termination notice a day after the date required by the lease, where the lease stated that time was of the essence. The appellate court rejected the tenant's argument that timely, oral notice is sufficient in lieu of actual notice. Instead, the appellate court found that oral notice highlighted the tenant's failure to comply strictly with the termination option. Furthermore, the appellate court found that although some courts grant equitable relief to a tenant where there is 'just excuse' for non-compliance, in this case there was no such just excuse.

#### Authors

[Kenneth M Jacobson](#)



[Devan Popat](#)



According to the appellate court, to be entitled to equitable relief, a tenant that fails to comply strictly with an option to terminate a commercial lease must, at a minimum, establish that:

- the delay in strictly complying was slight;
- the tenant would suffer undue hardship if strict compliance were not excused; and
- the landlord would not suffer prejudice if strict compliance were excused.

The appellate court held that the tenant's delay in strictly complying with the termination option was not slight because the tenant made a series of errors resulting in the initial delay, which were then exacerbated in its attempted cure. Moreover, the tenant's agent had failed to consult its lawyers in executing the termination option and had failed to read the lease. The appellate court also rejected the argument that the tenant would suffer undue hardship because:

- the tenant could have breached the lease, abandoned the premises and forced the landlord to mitigate its damages;
- the tenant could have subleased or assigned the lease to another party;
- the fact that the rent was well above market rate was not an excuse, given that the tenant was a sophisticated commercial retail tenant; and
- the tenant did not give or lose any consideration for the option.

The appellate court declined to address whether the landlord would suffer prejudice because the tenant failed to establish just excuse and undue hardship.

## Comment

The case illustrates the importance of understanding and complying with the terms and procedures to be followed in connection with a lease termination option. In this instance the tenant did not follow the precise terms of the lease option and lost the benefit of its bargain.

*For further information on this topic please contact [Kenneth M Jacobson](#) or [Devan H Popat](#) at Katten Muchin Rosenman LLP by telephone (+1 312 902 5200) or by fax (+1 312 902 1061) or by email ([kenneth.jacobson@kattenlaw.com](mailto:kenneth.jacobson@kattenlaw.com) or [devan.popat@kattenlaw.com](mailto:devan.popat@kattenlaw.com)).*

## Endnotes

(1) 2008 II App Ct 889 NE 2d 769.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at [www.iloinfo.com](http://www.iloinfo.com).



Official Online Media Partner to the International Bar Association  
An International Online Media Partner to the Association of Corporate Counsel  
European Online Media Partner to the European Company Lawyers Association

© Copyright 1997-2009 Globe Business Publishing Ltd