PRESENTED AT

2020 Bernard O. Dow Leasing Institute

November 12, 2020
Virtual Webcast

Texas Annotated Office Lease (Bankruptcy Excerpts)

Thomas M. Whelan
McGuire Craddock and Strother

Thomas M. Whelan
McGuire, Craddock & Strother, P.C.
Dallas, Texas

twhelan@mcslaw.com
(214) 954-6815

OFFICE LEASE

This Office Lease (*Lease*)[1] between **OVERLORD LEASING SYNDICATE**, a Delaware limited partnership (*Landlord*), and **SERF PROTECTIVE SERVICES**, a Texas corporation (*Tenant*), will become binding as a contract between the parties as of the date the conditions precedent set forth in paragraph 1(j) are satisfied (*Effective Date*), and each party agrees to memorialize the Effective Date in the Commencement Letter (**Exhibit E**).

1. **DEFINITIONS**. These capitalized terms are some of the defined terms used in this Lease:[2]

---

[1] These materails are excerpted from my annotated form office lease, which annotates a hybrid form of a modified-gross lease, or, if one prefers, a hybrid form of a modified net lease for a multi-tenant office building. A net lease is distinct from a gross lease, and the hybrid forms of each are distinct from each other, with respect to a single ***financial*** question: ***which charges are, or are not, included in base rent?*** The distinction between rent and other charges is important in determining the capped amount of a landlord's prepetition claims in a tenant's bankruptcy.

Net Lease. A net lease represents one end of the office lease spectrum. Under a pure net lease, base rent is net of (*i.e.*, ***does not include***) operating costs, taxes, and insurance — the expense triumvirate — in a "triple-net" lease. *See Fazio v. Cypress/GR Houston I, L.P.*, --- S.W.3d ----, 2012 WL 3524842 (Tex. App.—Houston [1st Dist.] August 16, 2012, no pet) (Massengale, J., dissenting) (stating that "[a] triple net lease is one under which a tenant pays not only rent but also taxes, common area maintenance fees, and insurance"), *opinion withdrawn and superseded on rehearing en banc by*, --- S.W.3d ---, 2013 WL 1416558 (Tex. App.–Houston [1st Dist.] (April 05, 2013) (unpublished opinion)); *Hoppenstein Props., Inc. v. Schober*, 329 S.W.3d 846, 850 fn. 2 (Tex. App.–Fort Worth 2010, no pet.) (stating, in context of lease in multi-tenant facility, that "[a] triple net lease is one in which the tenant's rent includes a percentage of the landlord's real property taxes, insurance, and common area maintenance charges for the property in addition to the basic rent."). Under a pure net lease, tenant pays all operating costs and bears the entire risk of operating cost increases. But the triple net label on a lease does not necessarily mean tenant bears all triple-net costs. One type of nearly triple-net office lease allots to landlord certain extraordinary costs, such as those incurred to repair structural defects, to remediate pre-existing environmental conditions, and the like. Also, a tenant in multi-tenant triple-net office lease should ensure that the lease allocates the cost of vacant leasable space to landlord and of leased space to the appropriate tenants.

Gross Lease. A gross lease represents the other end of the office lease spectrum. Under a pure gross lease, tenant pays base rent, and tenant's lump sum rent payment ***includes*** operating costs, taxes, insurance, and all other compensation for hiring the premises. In a pure, full-service gross lease, tenant gets price certainty, and landlord, who is responsible for paying all operating and other ownership costs, bears all of the risks of any cost increases and reaps any rewards of cost decreases.

Hybrid Lease. If pure net leases and pure gross leases were dogs, most office leases would be mutts, as is this mixed-breed office lease. This annotated form is part net lease: Base Rent is net of Electricity Costs and Real Estate Taxes. It is also part modified gross lease: Base Rent includes an expense base equal to the Operating Costs incurred in the Base Year. But Base Rent does not include Excess Operating Costs, the amount by which Operating Costs in a later year exceed Base Year Operating Costs. Base Year Operating Costs are gross (***included in***) Base Rent, while Excess Operating Costs are net of (***excluded from***) Base Rent. Excluding some categories of triple net costs from Base Rent entirely, while including Base Year Operating Costs in Base Rent, is the combination of gross and net features that makes this lease a hybrid. Under a hybrid lease, landlord and tenant, to one degree or another, share the financial risk of, and the responsibility for, containing increases in operating costs.

[2] ***Defined Terms***. Office lease forms use similar defined terms, but few forms define the same terms in precisely the same way. The same term does not mean the same thing from one lease to the next and, in some cases, from one paragraph in the same lease to the next. *See* Bryan A. Garner, ADVANCED LEGAL DRAFTING (1996), at p.8 (creating definitions as last rather than first resort), at pp. 81—89 (using definitions effectively). *See* BOMA Glossary of Terms, https://www.bomaeer.com/Boma/HelpFiles/HelpDocuments/GlossaryOfTerms.pdf

Defined Terms Ordinarily Prevail Over Ordinary Meaning. The definitions parties give to certain terms generally prevail over common law definitions, except when they don't. "When contracting parties set forth their own definitions of the terms they employ, the courts are not at liberty to disregard these definitions and substitute other meanings." *Fulton v. Texas Farm Bureau Ins. Co.*, 773 S.W.2d 391, 392 (Tex. App.—Dallas 1989, writ denied) (interpreting defined term "occupying"

(a) *Additional Rent* means Tenant's Pro Rata Share of (i) Excess Operating Costs [paragraph 1(l)]; (ii) Electricity Costs [paragraph 1(k)], and (iii) and Real Estate Taxes [paragraph 1(w)], together will all other sums due or owing under this Lease (other than Base Rent).[3]

---

in insurance contract in accordance with contractual definition instead of ordinary meaning); *Hart v. Traders & Gen. Ins. Co.*, 487 S.W.2d 415, 417-18 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.).

Defined Terms and Unambiguous Provisions Sometimes Yield. But courts freely exercise the liberty, which they profess to deny themselves, to disregard the parties' definitions, or the commonly accepted meaning of undefined terms, to effectuate overriding policies.

[3] ***Additional Rent***, as used in this Lease, includes all amounts Tenant is required to pay to Landlord other than Base Rent. Someone created the concept of additional rent in a mostly vain attempt to avoid an imagined collision between state common law or contractual definitions of ***"rent"*** and the provisions of the Bankruptcy Code that first allow but then limit the amount of a landlord's claim for rejection damages to the greater of ***"rent reserved"*** for one year, or **15** percent, not to exceed three years. *See* 11 U.S.C. §§ 365, 502(g) (allowing landlord to assert a general unsecured claim for damages resulting from tenant-debtor's rejection of a lease); 11 U.S.C. §502(b)(6) (capping amount of landlord's rejection damages claim).

Texas Law – Rent

Rent. At common law, "[t]he word 'rent' has a well-defined significance. The substantive means compensation which the owner of land receives for its use by another. The verb 'rent' means `to let out; to lease; as to rent one's house.' Those definitions are given, in substance, by all the standard dictionaries." *Turner v. First Nat'l Bank*, 234 S.W. 928 (Tex. Civ. App.—Texarkana 1921, no writ). "While rent is defined as the recompense for the use and occupancy of lands, it is not confined solely to compensation for the use of the land, for chattels are often demised with the land, and form no inconsiderable portion of the consideration for which rent is paid." *Stein v. Stely*, 32 S.W. 782, 783 (Tex. Civ. App. 1895, no writ) (stating rent for furnished house need not be segregated between compensation for use of real property and use of furniture to determine maximum amount of rent secured by statutory landlord's lien).

Taxes, Insurance & Repair Costs Are Not "Rent." Texas common law did not consider taxes, insurance, repair costs, and other charges to be part of rent.

> [I]n one sense the performance of every covenant on the part of the lessee is a return made by the tenant for the use of the land. Yet it would hardly be contended that money stipulated to be expended in repairs or for insurance, or in the way of improvements, was any portion of the rent.… Taxes are not, on that account, any more rent than the expenditure of money for insurance, under a covenant to that effect on the part of the lessee.

Korn v. Johnson, 117 S.W.2d 844, 846 (Tex. Civ. App.—El Paso, writ ref'd) (stating that "one of the 'properties' of rent at common law is certainty"); *see A.J. Robbins & Co. v. Roberts*, 610 S.W.2d 854, 856 (Tex. App.—Amarillo 1980, writ ref'd n.r.e.) (stating that tenant's lease and possession of privately owned realty does not obligate tenant to pay taxing authority or to reimburse landlord for *ad valorem* taxes, unless the lease contract requires tenant to do so).

Additional Rent is Not Rent in Eviction Proceedings. Texas law also distinguishes between rent, as such, and other charges accruing under a lease, in eviction proceedings. Rule 746 of the Texas Rules of Civil Procedure provides, as a general rule, that "actual possession" is the only issue to be tried in a forcible entry and detainer or forcible detainer action. TEX. R. CIV. P. 746. But Rule 738 establishes a narrow exception to the general rule. Rule 738 allows landlord to recover only rent, as such, of not more than $10,000 in the justice court, but it does not allow landlord to recover other damages of any kind in any amount. TEX. R. CIV. P. 738; TEX. GOV'T CODE § 27.031(a)(1) (justice court's maximum jurisdiction over amount in controversy is **$10,000**, exclusive of interest); *see Haginas v. Malbis Mem'l Found.*, 349 S.W.2d 957, 958 (Tex. Civ. App.—Houston 1961), *aff'd*, 354 S.W.2d 368, 371 (Tex. 1962) (holding landlord cannot recover damages for wrongful withholding of the premises in eviction suit); *Dews v. Floyd*, 413 S.W.2d 800, 805 (Tex. Civ. App.—Tyler 1967, no writ) (stating that landlord cannot join claims for wrongful withholding of premises or for other benefits accruing under lease contract in eviction suit). Likewise, a tenant cannot properly assert claims or offsets against rent in an eviction case. *Grayson v. Rodermund*, 135 S.W.2d 178, 180 (Tex. Civ. App.—Austin 1939, no writ) (holding that tenant could not assert counterclaim against landlord in forcible detainer action because possession is only issue to be tried); *John E. Morrison Co. v. Harrell*, 148 S.W. 1122, 1123 (Tex. Civ. App.—El Paso 1912, no writ) (stating that tenant in forcible detainer proceeding cannot assert counterclaim for value of services in excess of justice court's jurisdiction as an offset to landlord's claims for rent).

Rent v. Damages. Texas law also distinguishes between landlord's claim on the lease for rent and its claim for damages resulting from tenant's breach of the covenant to pay rent. *Maida v. Main Bldg. of Houston*, 473 S.W.2d 648, 651 (Tex.

UT LAW CLE | THE UNIVERSITY OF TEXAS | TEXAS LAW

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the UT Law CLE eLibrary (utcle.org/elibrary)

Title search: Lease Triage Strategies During the Pandemic: Texas Annotated Office Lease (Bankruptcy Excerpts)

Also available as part of the eCourse
2020 Bernard O. Dow Leasing Institute eConference

First appeared as part of the conference materials for the
2020 Bernard O. Dow Leasing Institute session
"Lease Triage Strategies During the Pandemic"