



Southern Nevada CCIM Chapter

PERSPECTIVE

JULY-AUGUST 2019 EDITION

City Lights

Sponsor & Designee Appreciation Event | July 19th



Photos Courtesy of Cashman Photo

HIGHLIGHTS FROM INSIDE:

PRESIDENT'S MESSAGE



By JENNIFER F. OTT, CCIM
2019 SOUTHERN NEVADA
CCIM CHAPTER PRESIDENT

Mark Your Calendars for the Annual Wine Soiree & Silent Auction

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LEGISLATIVE UPDATE

Opportunity Zone Programs Encourage Investments in Distressed Communities



By CARMINE DiFULVIO
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LEGAL BRIEFS

Are You Secure with Your Tenant?



By BRIAN R. HARDY, ESQ.
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Are You Secure with Your Tenant?

Landlords have a variety of security options when negotiating a lease with a tenant. While used less frequently than security deposits and personal guarantees, granting a landlord a security interest in the tenant's personal property can be an effective tool particularly when the tenant has valuable fixtures and/or inventory.

Nevada has codified its version of the Uniform Commercial Code (UCC) in the Nevada Revised Statutes Chapters 104 and 104A. NRS 104.9109(1) (a) applies to transactions which create "a security interest in personal property or fixtures by contract." An effective lien is created by a written security agreement between the tenant and the landlord. The security agreement is often contained in the lease, and the lien rights attach upon execution of the lease. The collateral secured must be adequately described in the conveyance document and the security interest must be perfected by the landlord's filing of a financing statement.

Secure the Collateral

A lease provision creating a security agreement can be relatively

straightforward: In consideration of the mutual benefits arising under this Lease and to secure the payment of all rent and other sums of money becoming due from Tenant under this Lease, Tenant hereby grants, in addition to any statutory lien for rent in Landlord's favor, an express contract lien and continuing security interest in...

However, the collateral description is an extremely important element. Landlords must describe the collateral as comprehensively as possible:

...all existing and after-acquired property including, but not limited to, all goods, accounts receivable, goodwill, wares, equipment, fixtures, furniture, inventory, accounts, contract rights, chattel paper and other personal property of Tenant (and any transferees or other occupants of the Premises) presently or hereafter situated on the Premises and upon all proceeds of any insurance which may accrue to Tenant by reason of damage or destruction of any such property.

As noted in the provision above, the description of the **CONT'D ON PAGE 9**



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collateral should not be limited to property owned by the tenant, but should include property owned by assignees or other transferees of the lease and other parties occupying the premises. Moreover, the description of the collateral should include on the premises at the time as well as any and all property later acquired property and brought into the premises during the term of the lease. Finally, a landlord should be mindful to include insurance proceeds and proceeds from any sale of the collateral.

Don't Forget to File

In order for a landlord to protect a security interest, a financing statement must be filed. Moreover, to perfect a security interest in fixtures, a fixture filing should be recorded in the real property records of the county where the fixtures are located. Regular continuation statements should also be filed to maintain the priority of a perfected lien. If done correctly, a perfected lien will render the landlord in the same position as other secured creditors should the tenant file bankruptcy.


Be Commercially Reasonable

In the event a landlord chooses to foreclose, the foreclosure must be conducted in a reasonable manner. NRS 104.9610(2) provides that “[e]very aspect of a disposition of collateral, including the method, manner, time, place and other terms, must be commercially reasonable.” Commercial reasonableness is a question of fact “to be determined on a case-by-case basis, in light of the totality of the circumstances surrounding the particular sale and in the context of the particular industry in which the sale took place.” “Whether a sale was commercially unreasonable is, like other questions about ‘reasonableness,’ a fact-intensive inquiry; no magic set of procedures will immunize a sale from scrutiny.” Some tenants may want to reserve the right to transfer the collateral in the ordinary course of business. Landlords may consent to these types of transfers but may require that any transferred collateral must be replaced with collateral of comparable or better quality. Further, the landlord may require that any such transfer rights would be terminated upon a default by the tenant. Conversely, a landlord may include a provision which prohibits the transfer of any (or even specific) secured collateral without the landlord’s prior consent.

Often times, secured parties attempt to liquidate the collateral as quickly as possible. While this is understandable given the fact that the secured party is often attempting to recover its losses, it may not be prudent to rush a sale and risk having the collateral tied up in litigation. Courts have noted that “[w]hile a low price is not conclusive proof that a sale has not been commercially reasonable, a large discrepancy between sales

price and fair market value signals a need for close scrutiny of the sales procedures,” particularly where the secured creditor is also the purchaser. Disposition of the collateral at fire sale prices, when the evidence shows that the creditor made little or no effort to find a buyer, is not commercially reasonable.” There are several factors that should be considered to assure a sale is commercially reasonable including:

whether the timing between the sale and notice was too short or too long; whether the seller advertised the sale; whether the sale was in a proper place; whether the seller permitted necessary inspections by prospective bidders; whether the seller performed necessary repairs; and whether the seller held the sale at the same time and location as advertised..

Given the potential pitfalls, it is prudent to work closely with an attorney or those familiar with foreclosure actions in order to avoid redoing an improper foreclosure sale and incurring fees and costs associated with defending the foreclosure sale. Simply put, security doesn’t just happen. It is the product of careful drafting, diligent filings and, when necessary, commercially reasonable sales. 

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