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Triangle attorneys detail what landlords, tenants need to know about leases

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As the coronavirus threatens the ability of business owners to cover rents or mortgages, Triangle real estate lawyers are urging clients on both sides of the lease to be both prepared, and proactive, as the crisis continues.

Start conversations now, they say.

And review your leases and insurance policies to fully understand your options.

“The first piece of advice we are giving landlords is don't act rashly,” says Wayne Maiorano of Smith Anderson in Raleigh.

“From a landlord's perspective, not to sound flip, but landlords should not be picking winners and losers. Right now they have the tenants they have. And they have to figure out what shape the tenants are in, and that comes from communicating with tenants.”

Nellie Shipley Sullivan, who is based in Raleigh and Atlanta for Womble Bond Dickinson, says she advises landlords to set up an “intake system” for tenants in order to vet what they really need. And be sure to create it in a way that tenants are realistic in what they seek.

Think in advance, she says, “about what might work for you” as far as adding rent months at the back of the lease or surcharges to cover rent abatements.

She also urged landlords to be talking to their lenders right away.

“Unlike the Great Recession, where lenders were getting judged harshly by the federal government ... now the system is trying to be more proactive,” she says. “They are trying to put money into the banks to be more proactive.”

Urgency is important, she said, in a situation that is “very unprecedented.”

“Don't wait until you've got a problem to talk to your lender,” Sullivan says. “Talk to them now.”

Attorney Keith Burns at Nexsen Pruettt agreed that the government is trying to avoid what happened a decade ago.

“For a landlord, its primary cost often is its mortgage expense, which leads to a conversation between the landlord and its lenders,” he says.

“Now, fortunately, the bank regulators have said, ‘We don't want a repeat of the Great Recession, so be as accommodating as you can be.’

“So a number of banks are offering up payment skips, payment deferrals, and if there is relief to be had for the landlord and the landlord can pass that to the tenant, that's a pretty good thing,” Burns says.

Be clear on your needs

The important point, Burns says, is to ask for exactly what you need and not be overly greedy. He pointed to the joke about how “pigs get fat and hogs get slaughtered,” saying now is a time to be realistic with lenders.



NICK PIRONIO

Attorney Wayne Maiorano of Smith Anderson in Raleigh.

"I would say be thoughtful and intentional and ask for what you need – and have a conversation about, 'How many bites at the apple do I get here?'" Burns said.

The attorneys also noted that the fact that courts are currently closed limits, for now, some of the usual remedies for a landlord.

Maiorano said landlords and tenants should carefully review their leases and insurance policies, especially when it comes to any business interruption provisions. And landlords should make sure they are clear of their obligations under a lease.

Any changes between lenders, landlords and tenants, he said, should be "properly papered" so that both landlords and tenants are clear about the changes going forward.

He also is in favor of confidentiality agreements, as a landlord might make one concession for a certain business (a popular restaurant that brings business to the shopping center, for example) that the landlord might not otherwise make.

Tenants are key

Much of how this plays out, of course, depends on tenants and their ability to eventually pay. As Burns pointed out, "the trends start with the tenants."

"So if you've got tenants in a position where they can't pay rent, the smart ones are calling their landlords to have a discussion about that: 'Here's my pain point. What can you help me do?'" he says.

Maiorano of Smith Anderson advised any tenants to make their rent if at all possible.

"For tenants, the most immediate advice is do not put yourself in a default position," he says. "If you can avoid being in default - as in stop paying rent - the better off you will be."

If they fail to pay rent, they lose leverage in later discussions.

But Maiorano is seeing a lot of lease defaults, especially in retail.

"Once they are in breach, it's a very different conversation. I really believe landlords are going to really try hard to work this out. They don't want to have dark spaces. They depend on those tenants to be there.

"But for them the challenge is, 'I've got to know what I'm facing,'" Maiorano says

Dane Huffman
Managing Editor
Triangle Business Journal

