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Newsletter

Commercial Law

June 2016



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Lease registration, a must for the commercial tenant!

A tenant who has undergone a lengthy lease negotiation process is sometimes under the impression that once the lease is executed by both parties the deal is done and there is nothing left to do. However, a tenant should remember to register its rights pursuant to its commercial lease to safeguard its rights from third parties. In fact, a tenant who fails to register its lease at the Land Registry Office can be evicted by a subsequent acquirer (including a hypothecary creditor who exercises its rights) before the expiry of the term of its lease. Unless the lease is registered at the Land Registry Office, in which case it is bound to respect the entire term of the lease, the acquirer is entitled to terminate an existing lease by sending prior notice. In the case of an unregistered lease of an immovable with a fixed term and if more than 12 months remain from the date of alienation or extinction of title, the acquirer or the person who benefits from extinction of title may resiliate (i.e., terminate) the lease upon expiry of the 12 months by giving the tenant written notice of six months.¹ Failure to give prior notice within the required delay will prevent the acquirer from exercising its right to terminate the lease, and as a result, the acquirer will have to respect the lease for the entire term.² Considering that the failure of a tenant to register its lease allows a future acquirer (or hypothecary creditor) to terminate the lease, a tenant should remember to register its lease to avoid having it end prematurely.

How?

A tenant can register its rights under a lease at the Land Registry Office in four different ways: (i) by presenting the lease itself, (ii) by presenting an authentic extract of the lease if the lease is notarized, (iii) by way of a summary (in such a case the lease must be submitted as well³) and (iv) by way of a notice of lease.⁴ The right to register a lease in one of the four ways available is of public order, which means that a landlord cannot forbid or restrict a tenant from registering its lease.⁵ Most tenants opt to register their lease by registering a notice of lease. In fact, many commercial leases require that the lease be registered by notice of lease as landlords often want to keep the financial terms of a lease confidential. Pursuant to article 2999.1 of the *Civil Code of Quebec* (the “CCQ”), the notice must refer to the lease in question, it must identify the landlord and the tenant and it must contain a description of the immovable in which the leased premises are situated. The notice must also indicate the term of the lease by referring to the commencement and termination dates of the lease and must mention all extension and renewal rights. The tenant should keep in mind that, pursuant to *An Act Respecting Duties on Transfers of Immovables*⁶, transfer duties will be payable upon the registration of rights under a lease the term of which is 40 years or longer (including all extension and renewal periods). A tenant should remember to include in the notice of lease any specific rights that were granted in the lease and of which it wants to give notice to third parties, such as, by way of example, exclusivities, rights of first refusal and rights of first offer.

What is the effect of registering a lease?

When a lease is registered, a new purchaser acquiring the building (or a hypothecary creditor exercising its rights on the building) is forced to respect the lease for the entire term. In fact, if the tenant registers its lease prior to the registration of a deed of alienation or another document which extinguishes the landlord's title, the subsequent acquirer of the building (or the hypothecary creditor, as the case may be), will not be able to terminate the lease.

In the 2004 decision *Compagnie Trust Royal v. Pinkerton Flowers Limited*⁷ ("**Pinkerton Flowers**"), the Quebec Court of Appeal concluded that a sale by agreement under judicial authority exercised by a hypothecary creditor constituted a forced alienation and a lease registered prior to such a forced alienation could not be terminated. From this decision we understand that the registration of a prior notice of the exercise of a hypothecary right determines the moment in which the forced alienation of the property occurs. Consequently, a tenant who registers its lease before the registration of a prior notice of the exercise of a hypothecary right can prevent the hypothecary creditor from terminating the tenant's lease.

The facts of the *Pinkerton Flowers* decision are as follows: a commercial lease was registered at the Land Registry Office on December 21, 1998. On February 15, 2000, Compagnie Trust Royal registered a prior notice of the exercise of a hypothecary right, pursuant to a hypothec that was registered on October 11, 1991. The prior notice of the exercise of a hypothecary right was followed by a sale by agreement under judicial authority, which occurred on December 21, 2000. Compagnie Trust Royal maintained that it could terminate the lease which was, according to Compagnie Trust Royal, registered after the "act by which title is extinguished" (article 1887 CCQ), that act being the hypothec that was registered on October 11, 1991. The Court of Appeal rejected this argument and determined that the sale by agreement by the creditor in the exercise of its hypothecary recourse was a forced alienation pursuant to articles 1886 and 1887 CCQ. Thus the lease could not be terminated since it was registered prior to the sale by agreement under judicial authority.

Conclusion

If you are a commercial tenant, and wish to ensure that your rights will be protected if the building in which your premises are located is sold or if the landlord's hypothecary creditor exercises its hypothecary rights on the building, it is in your best interest to register your lease! We would be pleased to assist you with the registration of your lease.

2. *Banque de Montréal v. Alcan*, [1983] C.A. 505, EYB 1983-142471.
3. Article 2985 CCQ.
4. Article 2982 CCQ.
5. Article 2936 CCQ.
6. CQLR c. D-15-1. See definition of "transfer".
7. *Compagnie Trust Royal v. Pinkerton Flowers Limited* REJB 2004-60362 (C.A.).

The content of this newsletter is intended to provide general commentary only and should not be relied upon as legal advice.

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1. Article 1887 CCQ. In the case of the lease of an immovable with a fixed term and if less than 12 months remain from the date of alienation or extinction of title, the acquirer or person who benefits from the extinction of title may not resiliate the lease. In the case of a lease of an immovable with an indeterminate term, the acquirer or person who benefits from the extinction of title may resiliate the lease by sending notice; the time for giving notice is the same as the rent payment period, or three months if the rent payment period exceeds three months. See article 1882 CCQ.