

Client Alert

Business Information for Clients and Friends of Shumaker, Loop & Kendrick, LLP

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Unable to Open For Business After Its Permit Was Denied, Tenant Nonetheless Ordered to Pay Entire Accelerated Lease Amount

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It's a tale as old as time. Tenant falls in love when it finds the perfect space to rent for its business. Instantly smitten, tenant takes a solemn vow and signs a long-term lease with landlord. But alas, the government doesn't approve. What does the spurned lover do? In this case, the tenant decided that notwithstanding the government's irrational and arbitrary disapproval, it wasn't worth the trouble to try to make love work. Sharing tenant's heartbreak (but for entirely different reasons), the landlord did what every rejected landlord does: accelerate the rent and sue for the entire lease amount. Hell hath no fury like a landlord scorned.

In BRE Mariner Marco Town Center, LLC v. Zoom Tan, Inc., Zoom Tan executed a five year lease without making any effort to determine its ability to legally operate a tanning salon at the premises, and without negotiating a lease termination option in the event the local governing body denied its permit application. Unfortunately for Zoom Tan, its building permit was denied on the basis that the proposed use as a tanning salon was not authorized by the zoning code. Incredibly, even though the zoning code did not prohibit tanning salons (and even referenced them in other contexts), Zoom Tan did not appeal the government's denial or make any effort to open for business.

Zoom Tan also never took possession of the premises, and it never paid rent. Landlord sued to recover the accelerated rent, and Zoom Tan asserted numerous defenses based "upon the premise that the permit denial precluded enforcement of the [lease]." Zoom Tan's strategy might have worked but for evidence revealing that its intentions changed after signing the lease. Landlord's attorneys at Shumaker, Loop & Kendrick, LLP discovered an email from Zoom Tan's president confessing that Zoom Tan had "no interest in spending money on attorneys" to try and lift the use restriction imposed by the government. The district court found (and the appellate court agreed) that in light of Zoom Tan's failure to make any attempt to appeal the permit denial, the record was devoid of evidence demonstrating that it was excused from performance under the lease. The appellate court was also "unpersuaded by Zoom Tan's claim that the [lease] was rendered unenforceable by the permit denial," because both parties agreed "that the relevant zoning regulation did not actually prohibit the operation of tanning salons, and thus the denial of the permit was in error."

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This decision demonstrates the importance of explicitly allocating the risk of permit or license denials in the lease. Since the tenant is in the best position to understand the needs attendant to and laws governing its business, the landlord would be well served to include a provision in the lease (as was included in the lease here) requiring the tenant to obtain all permits or licenses necessary to lawfully operate its business and also disclaiming any representation or warranty that tenant can lawfully operate its business at the leased space. By including such a provision in the lease, the landlord can avoid a later argument that performance is impossible due to the denial of the requisite permit or license, since this possibility was brought to the tenant's attention in the lease and therefore cannot be characterized as "unforeseeable." See, e.g., Walter T. Embry, Inc. v. LaSalle Nat'l Bank, 792 So. 2d 567, 570 (Fla. 4th DCA 2001) ("The doctrine of 'impossibility' must be applied with caution and is not available concerning intervening difficulties which could reasonably have been foreseen and could have been controlled by an express provision of the agreement."). Given the uncertainties attendant to any interaction with local government, the parties should also clearly define what efforts are required to obtain the requisite permit or license, and at what point the tenant has exhausted all avenues to come into compliance. As this case demonstrates, the lack of any such effort will not excuse performance under the lease.

Jaime Austrich and Meghan Serrano of Shumaker, Loop & Kendrick, LLP's Florida litigation practice successfully represented BRE Mariner Marco Town Center, LLC, a subsidiary of Brixmor Property Group, Inc. before the district court and the appellate court. Both frequently represent national commercial landlords in all facets of their business, from complex contract and land use disputes to evictions and collections. If you have questions, please contact Jaime Austrich at jaustrich@slk-law.com or Meghan Serrano at mserrano@slk-law.com.

Shumaker has a team of seasoned attorneys in each of its offices who specialize in commercial landlord-tenant matters. We help landlords and tenants large and small resolve the problems they face in their respective industries. At Shumaker, our attorneys bring years of experience to each matter and understand that landlords and tenants have unique circumstances and goals requiring individualized attention. Shumaker's attorneys understand the business as well as the legal needs of our landlord and tenant clients and continually strive to assure both are addressed in strategy and execution. Shumaker's commercial landlord-tenant practice has the size and depth to represent commercial property owners and tenants in every type of transaction and dispute that impacts their business.

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