

Put Restrictions on Owner's Right to Erect Scaffolding

Building owners may need to erect scaffolding to repair, clean, or renovate the façade of their building at some point. Although that may not sound like a problem for you, scaffolding left in place for a long time can spell bad news. If the owner's scaffolding blocks your store's visibility, your sales could end up dropping through the floor.

Lease Protects Owner, Not You

Even though your business may suffer because of the scaffolding, your lease may give the owner an unfettered right to erect the scaffolding, while giving you few or no rights against the owner. Therefore, the owner may be permitted, for example, to leave scaffolding up for months, without having to give you concessions in return for your business losses.

That scenario is unfair to you, notes New York City attorney Jonathan Weiss, who recently discussed this topic at a leasing seminar for a large retail broker group. The brokers told Weiss that scaffolding has become a very serious issue for some of their retail tenant clients because scaffolding can seriously harm retail businesses when left up for extended periods of time.

Solution: Add Clause Giving You Protections

To protect their tenant-clients, Weiss sent the brokers a sample scaffolding clause (see Model Lease Clause, at right) that he recommended they include in letters of intent and leases. You can adapt the clause to your leases, too.

Weiss's clause gives you certain protections if the owner erects scaffolding on the building. For example, the clause states that if the owner erects scaffolding on the sidewalk adjacent to your space, the owner agrees to:

- Erect the scaffolding in a way that doesn't unreasonably interfere with access to and visibility of your space;

- Perform the inspection, construction, maintenance, or repair work diligently and as quickly as possible;

- Erect "double height" scaffolding to minimize blockage of your store's visibility;

- Install a professionally printed sign, furnished by you, reflecting your name, logo, or other branding information, on the scaffolding directly above your space;

MODEL LEASE CLAUSE

Add Scaffolding Clause to Your Leases

The following Model Lease Clause was drafted by New York City attorney Jonathan Weiss. Put it in your letters of intent or leases to give you

certain protections if the owner erects scaffolding at your building.

Show this clause to an attorney in your area before putting it into your leases.

SCAFFOLDING

a. Scaffolding. If Landlord erects Scaffolding (as hereinafter defined) on the sidewalk adjacent to the Premises in connection with any inspection, construction, maintenance, or repair to the Building ("Scaffolding"), Landlord agrees to use commercially reasonable efforts to erect such Scaffolding in a manner that does not unreasonably interfere with Tenant's access to and visibility of the Premises. In such event, Landlord agrees to:

- (i) Erect "double height" Scaffolding;
- (ii) Install a professionally printed sign furnished by Tenant reflecting Tenant's name, logo, or other branding information on such Scaffolding directly above the Demised Premises ("Temporary Signage");
- (iii) Perform such inspection, construction, maintenance, or repair as diligently and expeditiously as reasonably practicable;
- (iv) Obtain Tenant's prior consent for any advertising on such Scaffolding; and
- (v) Reimburse Tenant, upon demand, for Tenant's reasonable out-of-pocket costs and expenses for any Temporary Signage.

b. Rent Abatement. Notwithstanding the provisions of Paragraph a hereof, if any Scaffolding remains for a period exceeding [*insert #, e.g., ninety (90)*] days during any period in which Tenant is operating its business in the Premises, then, for each day thereafter until such Scaffolding is completely removed, Tenant shall be entitled to a [*insert %, e.g., fifty percent (50%)*] abatement of Annual Base Rent, Additional Rent, and any other charges due and payable under this Lease.

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- Get your prior consent if the owner wants to advertise on the scaffolding;
- Reimburse you for your reasonable out-of-pocket costs and expenses for any temporary signage [Clause, Par. a]; and
- Give you a substantial—for example, 50 percent—rent abatement if the scaffolding stays in place for 90 days [Clause, Par. b].

Likely Owner Modifications

A smart owner may suggest a couple of key modifications to the scaffold-

ing clause to protect its interests. For instance, the owner may demand that your rent abatement not kick in until 180 days after the scaffolding is erected. And the owner may demand that you agree that the scaffolding will not change any of your lease obligations. Or if the scaffolding harms your business, it will not be tantamount to a type of eviction known as a “constructive eviction.” Why? Because if you can claim that the owner constructively evicted you by erecting scaffolding, you would be able to terminate your lease.

Try to resist agreeing to these owner demands. After all, you want the owner to have an incentive to finish the repair and maintenance work within 90 days, notes Weiss. Also, you should have the right to claim that the owner constructively evicted you from your space if the scaffolding stays up for an unreasonably long period of time, he adds.

Insider Source

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