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Commercial Real Estate Leases

As New York City's nonprofit sector mobilizes in response to Hurricane Sandy, Lawyers Alliance is ready to assist. With over 10 years of disaster relief experience Lawyers Alliance has helped nonprofits with disaster relief legal matters related to fundraising and grant-making, expansion and downsizing, real estate contingencies, and compliance with tax-exempt organizations law. If your organization has questions about assisting relief efforts or victims of Hurricane Sandy, contact Lawyers Alliance for support.

The answers to each of the following questions are based on the Standard Form of Office Lease (the "Lease Form") promulgated by the Real Estate Board of New York, Inc., which is often used for smaller office leases in New York City. Each landlord and tenant, however, must consult their actual leases, as the standard form is usually supplemented with Riders that amend the provisions of the Lease Form. Landlords may be willing to negotiate lease modifications for tenants who plan to return to the premises.

Question: Our organization holds leased property in the area that lost power or was damaged and untenable due to flooding. Was the lease automatically terminated as a result of the accidental destruction?

Answer: No, the lease continues in full force and effect.

Question: Can the tenant terminate its lease on the basis that Hurricane Sandy is a "casualty"?

Answer: In the provision of the Lease Form that governs casualty, the tenant expressly waives rights it may have been entitled to under Section 227 of the Real Property Law. Section 227 allows a tenant to surrender leased property that is "destroyed or so injured by the elements" if the tenant is not responsible for the destruction. Because the Lease Forms waives the tenant's rights the lease is not terminable by the tenant in the event of a casualty.

Question: Who is responsible for the property located in the demised premises that was damaged or stolen as a result of Hurricane Sandy?

Answer: The landlord is only responsible for damage to tenant's property or the theft of tenant's property when such damage or theft is caused by the landlord's negligence. In all other instances, including damage caused by other persons or by construction operations, the tenant is responsible for the tenant's property that was damaged or stolen. In the casualty provision of the Lease Form, the tenant expressly acknowledges that the landlord will not carry insurance on the tenant's furniture and/or furnishings or on any fixtures or equipment, improvements or appurtenances removable by the tenant and the tenant agrees that the landlord is not obligated to repair any damage to the same.



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Question: Who bears the obligation to repair damage to the demised premises as a result of Hurricane Sandy? Are tenants eligible for a rent abatement during the time the tenant's access to the demised premises was limited or restricted due to the casualty?

Answer: When flood or other casualty damages the demised premises, the tenant is to notify the landlord of the damage; however, the lease continues in full force and effect, except if the landlord decides to terminate the lease.

If the demised premises were partially damaged or rendered partially unusable, the damages to the demised premises shall be repaired by and at the expense of the landlord. In addition, the rent (including any additional rent) shall be adjusted according to the part of the demised premises that are unusable from the day following the casualty until the repair is substantially completed. If the demised premises were totally damaged or wholly unusable, the tenant is still obligated to pay rent up to the time that the casualty occurred. The tenant's obligation to pay rent ceases from the time of the casualty until the date the demised premises are repaired or restored by the landlord. The tenant's obligation to pay rent resumes five days after the landlord notifies the tenant in writing that the demised premises are substantially ready for the tenant's occupancy.

In cases where the demised premises were rendered wholly unusable, but the tenant reoccupies a part of the demised premises prior to the complete repair or restoration by the landlord, then the tenant is obligated to pay a portion of the rent according to the part of the demised premises that are unusable until the repair is substantially completed. However, where the demised premises were rendered wholly unusable, the landlord has the option to terminate the lease by written notice to the tenant in accordance with the terms of the lease.

Where the landlord decides to repair the demised premises the landlord is obligated to make such repairs with reasonable expedition, subject to delays due to insurance claim adjustments, labor expedition, or causes beyond the landlord's control. After a casualty, the tenant is obligated to cooperate with the landlord by removing all of tenant's salvageable inventory and equipment as promptly as reasonably possible.

Question: Does the lease terminate or is rent abated if the demised premises have not been damaged, but damage to the nearby buildings has limited our organization's access to the space?

Answer: The casualty provision in the standard form does not address the case where the premises have been rendered partially or totally inaccessible (as opposed to partially or totally damaged, as described above). The general rule, however, is that the tenant is not entitled to a rent abatement unless the lease specifically provides for one. Moreover, under the Lease Form, a landlord's inability to perform under the lease does not affect or excuse the tenant's rent or other obligations where the landlord is not the cause of the inability. Thus, if the tenant's access was limited because the premises were in an area without power or with flooding the landlord may argue that there should be no abatement for rent because the circumstances preventing or limiting



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access were beyond the landlord's control. If you are obligated to pay rent in this circumstance, you should consult with your insurance carrier to determine if you are eligible to make a claim for business interruption to cover rent payments made or owed for the period when you were displaced from, or had limited access to, the demised premises.

This alert is meant to provide general information only, not legal advice. Please contact Hedwig O'Hara at Lawyers Alliance for New York at (212) 219-1800 x 226 or hohara@lawyersalliance.org or visit our website <http://www.lawyersalliance.org> for further information.

Lawyers Alliance for New York is the leading provider of business and transactional legal services for nonprofit organizations that are improving the quality of life in New York City neighborhoods. Our network of pro bono lawyers from law firms and corporations and staff of experienced attorneys collaborate to deliver expert corporate, tax, real estate, employment, intellectual property, and other legal services to community organizations. By connecting lawyers, nonprofits and communities, we help nonprofits to develop affordable housing, stimulate economic development, promote community arts, and operate and advocate for vital programs for children and young people, the elderly, and other low-income New Yorkers.