What Happened to my Prevailing Party Attorneys' Fees Claim Against my Tenant?

James A. Gober

Many leases contain a provision that the "prevailing party" in any litigation between the landlord and its tenant is entitled to recover all of its legal costs, including attorneys' fees. However, that provision does not *necessarily* protect the landlord against having to pay its own attorneys' fees even where its tenant is solvent and able to pay and the outcome in the litigation is favorable to the landlord.

To avoid becoming obligated to pay attorneys' fees, a tenant who brings a lawsuit against its landlord and then recognizes that it is losing could simply dismiss the case voluntarily before the judge enters a final judgment. Under Georgia law, there can be no "prevailing party" in a lawsuit unless the judge enters a final ruling on the merits of the case. Thus, a dismissal ends the case before there is any such ruling. Similarly, a tenant that is sued by its landlord and recognizes that it is losing may try to avoid becoming obligated to pay attorneys' fees by reaching a settlement before the judge rules. If the settlement agreement does not expressly obligate the tenant to pay the landlord's attorneys' fees, then the landlord cannot successfully claim after settlement that it is entitled to prevailing party attorneys' fees under the language of the lease.

A carefully worded lease provision can protect the landlord's right to recover "prevailing party" attorneys' fees in these situations. For example, the lease could provide that: "The prevailing party in any litigation or arbitration proceeding between the parties to this lease shall be entitled to recover its legal costs and expenses, including reasonable attorneys' fees. In the event that any court or arbitration proceeding commenced by a party to this lease is dismissed voluntarily or involuntarily other than in connection with a negotiated settlement, the party that initiated the proceeding shall be deemed the non-prevailing party for purposes of this prevailing party attorneys' fees provision. In the event of a settlement, the parties shall address the issue of payment of attorneys' fees in their settlement agreement; provided that the landlord shall be deemed the prevailing party under this provision if they fail to do so."

Even where a lease appears to protect the landlord's right to recover attorneys' fees if any lease dispute is concluded successfully, the landlord should always consult an attorney and never assume that its litigation costs *necessarily* will be reimbursed by the tenant.

Authors and Contributors

James A. Gober
Partner, Atlanta Office
404.873.8676
james.gober@agg.com

not *if*, but *how*.®

About Arnall Golden Gregory LLP

Arnall Golden Gregory, a law firm with more than 150 attorneys in Atlanta and Washington, DC, employs a "business sensibility" approach, developing a deep understanding of each client's industry and situation in order to find a customized, cost-sensitive solution, and then continuing to help them stay one step ahead. Selected for The National Law Journal's prestigious 2013 Midsize Hot List, the firm offers corporate, litigation and regulatory services for numerous industries, including healthcare, life sciences, global logistics and transportation, real estate, food distribution, financial services, franchising, consumer products and services, information services, energy and manufacturing. AGG subscribes to the belief "not if, but how.®" Visit www.agg.com.

Atlanta Office
171 17th Street, NW
Suite 2100
Atlanta, GA 30363

Washington, DC Office
1775 Pennsylvania Avenue, NW
Suite 1000
Washington, DC 20006

To subscribe to future alerts, insights and newsletters: **http://www.agg.com/subscribe/**