

## Resources

### Should It Stay or Should It Go? Practical Tips for How to Handle Fixtures, Trade Fixtures, and Other Common Issues When Your Commercial Lease Term Comes to an End

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Whether you are a commercial landlord or tenant, a number of questions arise as you approach the end of a lease term. What is the tenant allowed to remove from the premises? What repairs or restoration are the tenant's responsibility? What should I consider in the transition of possession of the space from tenant back to landlord? We hear these questions from clients on a regular basis and, while every situation is unique, there are some basic rules and practices that commercial landlords and tenants should consider.

When it comes to determining whether fixtures, alterations, equipment or personal property located in a leased premises should stay or be removed at the end of the lease term, the best approach is a proactive one. As you are negotiating your lease, you should be specific in identifying all categories of items in the premises, and how those items will be dealt with at the end of the lease term (or whenever possession is surrendered). The parties should consider attaching an exhibit to the lease specifically listing all fixtures, trade fixtures, equipment, etc., so that there is no debate as to ownership of these items when the lease ends. The parties also should consider allocating responsibility for the cost of removal or repairing any damage incurred through the removal of such items, and whether any alterations to the premises must be restored to the original condition before surrender.

In an addition to focusing on surrender issues when the lease is negotiated, there are other steps landlords and tenants can take to protect themselves at the end of the lease term. One such step is to document the physical condition of the premises at the time of commencement and surrender (e.g., taking photographs and video from every angle, and preparing signed, written reports with the dates and details of any inspections). From the landlord's perspective, this evidence will support any claims you may have against the tenant for damage to the premises, or conversion of items that should have remained in the premises. It will also help you defend against potential claims by the tenant that you unlawfully converted property left in the premises. From the tenant's perspective, this evidence will support your claims for recovering a wrongfully withheld security deposit, and will help you defend against a landlord's claims of physical damage to the premises.

#### Fixtures vs. Trade Fixtures

Some of the more common disputes that arise at the end of a lease term involve arguments over the difference between fixtures and trade fixtures, and what items should remain in the premises after the lease term. The Michigan Court of Appeals ("COA") recently added some clarity to these issues in *Cassidy Rae Studio, LLC, et. al. v SOF Holland Town Center, LLC, et. al.*, unpublished per curiam opinion of the Court of Appeals, issued December 26, 2019 (Docket No. 345984). In that case, the commercial landlord, SOF Holland Town Center, LLC, ("SOF") leased a salon space to Cassidy Rae Studio, LLC ("Cassidy") for a term of five years. Under the lease, SOF agreed to complete, "at [SOF's] sole cost and expense," \$60,000 in interior renovations, which included installation of an affixed reception desk and color bar (i.e., cabinetry for storing hair products, etc.). The lease also provided that "any additions to, or alterations of, the premises, *except trade fixtures*, shall upon expiration or termination of the lease term become a part of the realty and belongs to the landlord." (Emphasis added).

A few months before the lease term expired, Cassidy closed its salon business and attempted to liquidate the salon's assets through a sale to an interested buyer. When the buyer contacted SOF's agent to inquire about the value and ownership of certain equipment and fixtures in the salon, SOF's agent informed the buyer that SOF owned some of the items, including the color bar and reception desk. The deal between Cassidy and the potential buyer ultimately fell through, and Cassidy then removed the color bar and reception desk from the premises just before the lease term expired. Thereafter, Cassidy sued SOF, claiming breach of the lease, tortious interference with a business relationship, and conversion. Essentially,

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Cassidy argued that by claiming SOF owned the color bar and reception desk, SOF's agent had interfered with the negotiations between Cassidy and their potential buyer. SOF filed a counterclaim against the plaintiffs for conversion of the color bar and reception desk. The trial court ruled in favor of Cassidy, finding that the color bar and reception desk were trade fixtures owned by Cassidy; and thus SOF was liable for breach of the lease and conversion for asserting ownership of those items.

On appeal, SOF argued that the trial court erred in determining that the color bar and reception desk were "trade fixtures" and that those items were additions to the premises which, per the lease, would "become a part of the realty and belong to the landlord." The COA agreed with SOF, overturned the trial court's ruling, and held that Cassidy (and not SOF) was liable for conversion because "the reception desk and color bar were fixtures that belonged with the realty after the termination of the parties' lease." In order to reach that conclusion, the COA examined the legal definition of "fixtures" and "trade fixtures:"

The term "fixture" necessarily implies something having a possible existence apart from realty, but which may, by annexation, be assimilated into realty. Property is a fixture if the following criteria exist: First, annexation to the realty, either actual or constructive; second, adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and third, intention to make the article a permanent accession to the freehold.

On the other hand, a "trade fixture" is a fixture installed on a leasehold by a tenant that the tenant may remove at the termination of the lease.

Applying these definitions, the COA concluded that the "reception desk and color bar were fixtures that belonged with the realty after the termination of the parties' lease." Because the reception desk and color bar were included in the lease's description of the landlord's work to be performed at the beginning of the tenancy, and because Cassidy did not pay for or install those items, they were not trade fixtures, and thus could not be removed by Cassidy at the end of the lease term. Cassidy has filed a motion for reconsideration, and could still potentially appeal to the Michigan Supreme Court, so we will continue to monitor this case.

This case highlights both the importance of properly addressing fixtures and trade fixtures in your lease negotiations, as well as ensuring that you have a clear understanding of what should stay and what should be removed when the lease expires. Whether you are a commercial landlord or tenant, if you have any questions as to your rights at the end of your lease, you should consult with legal counsel before taking action. A mistake in this area could be very costly as liability for conversion in Michigan can include treble (*i.e.*, triple) damages and payment of the other party's attorney's fees and costs.

If you have questions about the matters raised in this alert, please contact Michael Vogt at 248-203-0739 (mvogt@dykema.com) or your regular Dykema contact.

## Attorneys

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## Practice Areas

Leasing & Property Management

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