

**TENANT'S REMEDIES FOR LANDLORD'S UNREASONABLE REFUSAL
TO CONSENT TO A SUBLEASE**

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Introduction

Good news! Someone is interested in leasing space in your client's building. Unfortunately, the transaction is a sublease, not a direct lease, and even though your client's lease with the lucky sublandlord prohibits your client, as landlord, from unreasonably withholding his consent to the sublease, he impulsively sends a letter to the tenant refusing to consent to the sublease, without giving any explanation as to why he will not consent. Later, he panics and calls you to see how much his letter might cost him. The purpose of this brief article is to answer that question.

Property Law versus Contract Law

As an initial matter, you'll want to know whether the state in which the property is located considers a lease to be a conveyance of an interest in property or a contract. The majority of states still consider a lease to be a conveyance, and a tenant's duty to pay rent absolute. In those states, if the lease is silent as to whether the landlord may withhold its consent to a sublease unreasonably (i.e., the relevant section simply provides that tenant may not sublease without first obtaining landlord's consent), then landlord may withhold its consent arbitrarily. In contrast, states that regard leases as contracts impose upon landlords and tenants a duty of good faith and fair dealing, and landlord's agreement not to unreasonably withhold consent to a sublease is read into the lease.

Possible Remedies

A tenant's cause of action for a landlord's unreasonable withholding of consent will depend in part upon whether the state's courts consider the lease to be a contract or a conveyance. If it is a contract, the tenant might bring a cause of action for a breach of the contract in lieu of a tort such as intentional interference with contractual relations. In *Parr v. Triple L & J Corp.*, 107 P.3d 1104 (Colo. App. 2004), the court applied the "economic loss" rule, i.e., if tort claims are based on contractually-imposed obligations (e.g., the obligation not to unreasonably withhold consent to a sublease), then contract -- not tort -- law provides remedies for economic losses. The *Parr* court also allowed a tort claim for emotional distress, however, and further noted that although punitive damages would not normally be allowed for a breach of contract claim, the court was allowed to award punitive damages since there was also an award for emotional distress. Other courts are not as concerned with distinguishing between breach of contract and tort claims. (See *Campbell v. Westdahl*, 715 P.2d 288 (Ariz. Ct. App. 1985), a case in which the jury seemingly arbitrarily divided the \$72,752 award to tenant for landlord's unreasonable withholding of consent to an assignment into a \$5,750 breach of contract award and a \$67,000 award for intentional interference with contract.)

Regardless of whether an unreasonable withholding of consent is deemed to be a breach of contract or a tort, some of a tenant's possible remedies against a landlord are as follows:

1. **Lease Termination.** Some cases hold that Tenant may terminate the lease. In *Ringwood Associates Ltd. v. Jacks of Route 23, Inc.*, 379 A.2d 508 (N.J. Sup. 1977), the court held

that where a landlord refused to consent to a tenant's request to assign, apparently because the landlord wanted to lease space to the assignee directly for higher rent, tenant was entitled to vacate the premises and stop paying rent, because "a substantial breach of a material, mutually dependent covenant in a bilateral contract excuses the injured party from further performance." *Id.* at 514. Other cases hold that a tenant is not released from performance of his duties under the lease following landlord's unreasonable withholding of consent. See *Campbell v. Westdahl*, 715 P.2d 288 (Ariz. Ct. App. 1985).

2. Specific Performance. Some courts grant specific performance (i.e., landlord must consent to the proposed subtenant). See *Hedgecock v. Mendel*, 263 P. 593 (Wash. 1928).
3. Damages. Some of the categories of damages owed to tenant are as follows:
 - a. Lost bargain. This category of damages can be significant if, for example, the proposed sublease was in conjunction with a proposed sale of tenant's business. A tenant is also sometimes entitled to reduce rent by the amount of sublease rent tenant would have received.
 - b. Excess subrents over prime rent. We should all be as lucky as the tenant in *Assocs. Commercial Corp. v. Bayou Mgmt., Inc.*, 426 So. 2d 672 (La. Ct. App. 1983). He found a subtenant who was willing to pay a higher rent than the prime lease rent, and the court awarded the tenant the excess rent as damages after landlord unreasonably withheld its consent to the sublease.
 - c. Exemplary damages. Occasionally, the court finds the landlord's actions to be so egregious that the court awards the tenant exemplary damages. See *Parr v. Triple L & J Corp.*, 107 P.3d 1104 (Colo. App. 2004).
 - d. Damages for Emotional Distress. Again, see *Parr*.
 - e. Attorneys Fees and Costs. These are generally awarded when the lease specifically includes a prevailing party provision or attorneys fees are granted by statute.

Sometimes, the damages due to a tenant when a landlord unreasonably withholds consent can be quite significant. A case that should strike terror into the heart of all landlords (including our impulsive consent-refusing client) is *Toys "R" Us, Inc. v. NBD Trust Company of Illinois*, No. 88 C 10349, 1995 WL 591459 (N.D. Ill Oct. 4, 1995). In that case, tenant requested landlord's consent to sublease, and landlord refused to consent without requesting any information regarding subtenant's finances or plans to use the space. Later, landlord offered a number of reasons for withholding consent, but it appeared that landlord actually wanted to lease space to tenant's subtenant directly. The court rejected the landlord's pretexts for withholding its consent and ultimately awarded tenant \$1,575,754.40 in damages, \$640,016.50 in attorneys fees and \$84,208.45 in litigation expenses. One of the noteworthy aspects of the court's opinion is that the court assumed, for purposes of calculating damages, that both tenant and subtenant would have exercised their options to extend their lease terms, because where there is any uncertainty with respect to lease renewals, the court noted, the tenant is favored.

Limitation of Remedies

Of course, a landlord can limit a tenant's remedies in its lease by providing that a tenant's sole remedy for a landlord's failure to consent to a proposed assignment or sublease is to bring an action for declaratory judgment or specific performance, and in such event, no damages will be awarded. The court in *Gladlitz, Inc. v. Castiron Court Corp.*, 677 N.Y. S.2d 662 (N.Y. Sup. Ct. 1998) noted that such a provision was specifically bargained for in the lease in question, and saw no reason why the clause shouldn't be upheld. In that case, the language read as follows:

Wherever Landlord in this lease agrees not to unreasonably withhold his consent, it is understood and agreed that Tenant's sole remedy in connection with any refusal on the part of the Landlord to give its consent in writing shall be limited to bringing an action for declaratory judgment or for specific performance and in no event shall Tenant bring an action for damages against the Landlord or shall Landlord be liable to the Tenant for the Landlord's refusal to grant its consent.

Id. at 664.

Tenants with negotiating power should strike this language or, failing that, provide for some sort of summary proceeding to resolve the issue of whether landlord has unreasonably withheld its consent, because a tenant is pretty certain to lose its potential subtenant long before a lawsuit concludes. Certainly, *Ernst Home Ctr., Inc. v. Sato*, 910 P.2d 486 (Wash. Ct. App. 1996), a case in which a landlord finally agreed to allow retail tenant Value Village to sublease a portion of a shopping center midway through a lawsuit to determine whether landlord had unreasonably withheld its consent is the exception rather than the rule. A potential subtenant is probably as patient as Value Village was in that case only when something about the space in question is extremely unique (which is probably more common in the retail context than in the office context).

Conclusion

An ounce of prevention is worth a pound of cure. Haste makes waste. Act in haste, repent at leisure. Insert additional tired maxim here. Given how significant the damages for a landlord's unreasonable withholding of consent can be, a landlord should plan ahead by either (a) negotiating a limitation of tenant's damages for landlord's unreasonable withholding of consent in its lease with a tenant, or (b) determining whether it can reasonably withhold consent before it sends a letter denying consent.

Cases

Attached hereto is a chart that describes the cases mentioned in this article, along with a few other cases. Many of the cases involve an assignment rather than a sublease, but the general rules with respect to consent should be the same. I gratefully acknowledge the assistance of Erik Jarmusz in researching caselaw and preparing the chart.

Case	State	Clauses	Facts	Award	Notes
Campbell v. Westdahl , 715 P.2d 288 (Ariz. Ct. App. 1985)	AZ	Consent required, reasonableness is implied by law in this court	T was renting space for below market rent and was using an outside area which was not mentioned in lease. T was selling nursery business and found buyer for \$96k. T requested consent; LL refused unless purchaser would agree to higher (market) rent and to pay rent for the outside area. Purchaser rejected offer and the deal fell through. T vacated premises 6 mos. early.	\$72,752 to T (arbitrarily divided by jury as \$5,750 for breach and \$67,000 for tort) \$11,960 to T for attorney's fees \$5,750 to LL (counterclaim, for rent)	Court implied a good faith and commercial reasonableness standard on LL in determining whether to grant consent. Court also found that the elements for intentional interference with contract (the purchase and sale contract) were met. Court awarded LL damages for T's failure to pay rent, b/c T not released from performance of its duties under lease. \$72,752 reflects the amount of lost profit of the sale of nursery.
Parr v. Triple L & J Corp. , 107 P.3d 1104 (Colo. App. 2004)	CO	Consent shall not be unreasonably withheld Prevailing party granted attorney's fees	T attempted to sell its restaurant business and assign its interest in the lease to purchaser. LL requested more information (personal and financial info) about the prospective buyer. T provided that information, and then LL requested more detailed information. LL delayed so long that purchaser withdrew offer. Expert witness testified that LL had enough information to make a decision and that delay was unreasonable.	\$20,000 (for breach, which represent lost profits; \$20,000 tort claim was reversed) \$13,537.50 (for costs and attorneys fees, due to prevailing party clause) \$1,500 for emotional distress, plus \$5,000 for punitive damages	Tort judgment for economic loss of \$20k was overturned due to "economic loss" rule, i.e., if tort claims based on contractually-imposed obligations, contract law provides remedies for economic losses. Although punitive damages are not normally allowed for breach of contract claims, \$1,500 was awarded for a tort claim of emotional distress, so the punitive damages judgment was allowed to stand.
Toys "R" Us, Inc. v. NBD Trust Co. of Ill. , No 88 C 10349, 1995 WL 591459 (N.D. Ill. Oct. 4, 1995)	IL	Consent shall not be unreasonably withheld	T requested LL's consent to sublease, and LL refused to consent without requesting any information regarding subtenant's finances or plans to use space. Later, LL offered a number of reasons for withholding consent, but it appeared that LL actually wanted to lease space to T's subtenant directly.	\$1,575,754.40 in damages (court assumed T and subtenant would have extended leases, because where uncertainty re renewals, T is favored) \$640,016.50 in attorneys fees \$84,208.45 in litigation expenses	LL offered a number of justifications for withholding consent (subtenant's use, expected reduction in percentage rent, expected alterations to exterior, restoration requirements, etc.), and court found all of them to be pretexts for LL's true, unreasonable reason for withholding consent: LL wanted to lease to T's subtenant directly.
Assocs. Commercial Corp. v. Bayou Mgmt., Inc. , 426	LA	Consent required, no reasonableness language	T needed more space, requested consent from LL to sublease to an existing tenant in the building (Catalytic); LL refused. T paid 13 months' rent and an early termination payment then vacated its	Refund of \$20,343.75 (12 months' rent) plus interest Refund of \$4,068.75 (prepaid termination fee)	One months' rent was not refunded. Court reasoned that b/c that amount was paid by separate check, T must have intended to continue renting in the month in question.

So.2d 672 (La. Ct. App. 1983)			space. LL then leased space to Catalytic for more than T was paying, and T brought suit to recover 13 months' rent and early termination payment.	\$2,406.25 in damages (for Catalytic's excess rent paid over amount of T's rent)	Essentially, T was returned the 12 months' rent that it prepaid and the termination fee, and T was also awarded \$2,406.25 as damages for the lost profit it would have made by subleasing to Catalytic.
Nisby v. Sheskey , No. 1707, 2007 WL 1849101 (Mass. App. Ct. June 26, 2007)	MA	Consent shall not be unreasonably withheld/delayed	Original lease prohibited assignment/sublease outright, T objected and insisted that LL's consent would not be delayed or unreasonably withheld. T grew out of space and attempted to assign, LL rejected all inquiries to sublease / did not refer inquiries to T; T's attempt to negotiate a "buy out" with LL was also rejected.	\$5,700, plus interest (rent was \$2,800, damages included wrongful conversion of T's fence) \$6,500 in attorneys fees	Court said a "material breach" is a breach of an "essential and inducing feature of the contract." Court found implied covenant of good faith and fair dealing.
Halper v. Demeter , 610 N.E.2d 332 (Mass. App. Ct. 1993)	MA	Consent shall not be unreasonably withheld/delayed	T wanted to sell restaurant and requested consent to assign lease to purchaser.	\$379,322 plus interest and costs T relieved of obligation to pay rent	LL's "adamant and intentional conduct" in refusing to consent "transcended a mere breach of contract"; LL is liable for the tort of interference with an advantageous relationship. Damages were for lost profits as supported by an accountant; on appeal, original double damages and \$10,000 award for emotional distress not upheld.
D.L. Dev., Inc. v. Nance , 894 S.W.2d 258 (Mo. Ct. App. 1995)	MO	Consent shall not be unreasonably withheld	T has 68 years left on 99 year lease and wanted consent to sublet (sublease was for a cellular communications tower). LL refused without explanation. When T asked for an explanation, LL explained that LL would not consent unless T renegotiated the lease.	\$8,400 (amount of rent for one year of sublease; the sublease was for a 10 year term, and it is unclear why trial court only awarded one year's rent, but appellate court found that damages weren't so arbitrary and unreasonable as to shock sense of justice)	Consent was held "hostage" for the "ransom" of renegotiating the lease. Lost rent is not considered "lost profits" (which must be concretely proved), but rent is certain and self proving (by lease). Damages are the amount of money which would compensate T for the LL's breach of contract.
Brigham Young Univ. v. Seman , 672 P.2d 15 (Mont.	MT	Consent shall not be unreasonably withheld	T relocated and attempted to sublease to Montana Board of Parole and Probation ("MBPP"). T requested consent from LL. Other tenants opposed the sublease, thus	LL is due rent from T less the amount MBPP would have paid had LL consented	Court found LL in breach, because LL attempted to lease to MBPP in the past. Court did not allow termination of lease;

1983)			LL denied consent. T considered the lease terminated. LL sued T for rent. LL eventually moved another smaller tenant, Waddel and Reed (“W&R”) into the T’s former space in attempt to mitigate damages.	Additional rent paid by W&R will also mitigate any rent due to LL by T Costs to T	T’s options included: (1) specific performance; (2) assign/sublet to MBPP and let a court determine the legality of sublease; (3) sue for declaratory judgment; (4) offset LL’s claim for rent. Court found consent clause to be “independent clause;” it does not affect T’s duty to perform under the lease.
Buck Consultants, Inc. v. Glenpoint Assoc. , No. 03-454, 2004 WL 5370571 (D.N.J. 2004)	NJ	Consent shall not be unreasonably withheld or delayed LL not to be liable for damages unless court finds that it acted in bad faith.	T entered into negotiations to sublease space to another tenant, Eisai. LL then offered to lease Eisai additional space and approve the sublease with T if Eisai would extend its lease with LL for 6 years. Eisai rejected offer. T then requested approval for sublease and LL refused to consent b/c LL did not want to compete with T’s ability to sublease for less rent. Eisai found additional space elsewhere and T refused to pay rent for the space Eisai would have sublet. Lease provides no monetary damages unless LL acted in bad faith or maliciously.	Vacating premises and termination of rental payments (for the area that was to be sublet) was an appropriate remedy	Court said it must enforce the lease. Thus, damages were restricted unless court determined LL to have acted in bad faith, which it did.
Ringwood Assoc. Ltd. v. Jack’s of Route 23, Inc. , 379 A.2d 508 (N.J. Sup. Ct. 1977)	NJ	Consent shall not be unreasonably withheld	With 5 yrs left on lease, T moved to larger space across the street and wanted to assign. LL did not request information about potential assignee and refused to be part of a tripartite assignment agreement, but wanted to enter into a new lease with potential assignee for increased rent. T moved out and stopped paying rent. LL sued T for unpaid rent.	Vacating the premises and terminating rental payments was considered an “appropriate remedy”	Court finds reasonableness as an affirmative covenant by LL, which imposes liability on LL for breach of his obligations; therefore, LL has duty to mitigate damages. Lease is viewed as a contract, not a conveyance of property governed by property law. “Substantial breach of a material, mutually dependent covenant in a bilateral contract excuses injured party from further performance.”
Giordano v. Miller 733 N.Y.S.2d 94 (N.Y. App. Div. Nov. 5, 2001)	NY	Consent not to be unreasonably withheld	T entered lease and attempted to assign, LL requested a fee to consent; lease did not provide for a fee; T was to receive \$15,344.14 at lease signing.	\$15,344.14, no costs	Damages appear to be the lost profit T apparently would have made at closing of assignment of lease.

<p>Gladliz, Inc. v. Castiron Court Corp., 677 N.Y.S.2d 662 (N.Y. Sup. Ct. 1998)</p>	<p>NY</p>	<p>Consent shall not be unreasonably withheld</p> <p>Sole remedy for LL's failure is limited to action for declaratory judgment/specific performance (no damages)</p>	<p>After T executed lease, it entered negotiations to assign to Gap (LL refused consent for T's failure to pay rent); then T negotiated with Designs (LL refused consent due to potential lease modifications); finally lease assigned to Guess with LL's approval.</p> <p>T sued for difference in profit it would have received from Gap (\$675k) vs. Guess (\$500k); rent it had to pay due to non-consent of Gap lease; and other damages including business losses.</p>	<p>No damages awarded</p>	<p>Court reasoned that both the lease's limitation on LL's ability to refuse consent and the limitation on damages to declaratory judgment/specific performance were bargained for; there is no reason why clauses shouldn't be upheld.</p> <p>Damages included in complaint were not contemplated in the lease.</p>
<p>Ernst Home Ctr., Inc. v. Sato, 910 P.2d 486 (Wash. Ct. App. 1996)</p>	<p>WA</p>	<p>Consent shall not be unreasonably withheld</p> <p>Lease also provides that no rent is to be paid during period of default by LL.</p> <p>Prevailing party granted attorney's fees</p>	<p>T closed store and attempted to sublease to Value Village ("VV"). LL stated that consent from the other tenants was necessary; T disagreed. When consent was not forthcoming T sued asking for damages and declaratory relief. T was able to show that VV was financially suitable to be a tenant, and LL eventually consented to sublease.</p>	<p>Rent suspended while LL refused consent (per default clause in lease); T owes rent for period of time from date of declaratory judgment to when VV actually moved in (b/c default ended)</p> <p>T granted attorneys fees and costs</p>	<p>Court does not opine on whether lease should be terminated for LL's failure to consent.</p> <p>Prevailing party provision enforced.</p>
<p>Hedgecock v. Mendel, 263 P. 593 (Wash. 1928)</p>	<p>WA</p>	<p>Consent shall not be unreasonably withheld for any captious reasons, but consent shall be given in the event that the assignee presented is proper and fit</p>	<p>Lease also provided for arbitration if LL refused to consent to assignment. T requested assignment, LL refused. T went through process of appointing an arbitrator; LL did not perform his part of the arbitration process leaving T without any relief. T sued for specific performance.</p>	<p>Specific performance granted</p>	<p>Court refers to lease as a deed, and thus views the lease as a conveyance. Court does not think there is a covenant until LL promises consent "shall be given in the event that the assignee presented as a fit and proper person or corporation with financial resources of sufficient amount to render the lessors safe in so consenting."</p> <p>Can't resist quoting this: lease entitles LL to receive \$50 per assignment to cover their "bother and expenses."</p>