

NEW YORK HOUSING JOURNAL

Brought to you by the Community Housing Improvement Program, Inc., an association of apartment building owners

WHAT YOU MUST KNOW WHEN NEGOTIATING A LAUNDRY ROOM CONTRACT

By Adam Leitman Bailey and Dov Treiman

It is amazing how good building owners and managers are at increasing and garnering revenue from residential tenants while at the same time leaving themselves to the will and whim of laundry room operators who impose contracts lasting for decades with automatic renewals, rights of first refusal and other one-sided provisions. The fault is with the owner and owner's counsel for failing to exercise even rudimentary due diligence. This article attempts to arm building owners with the a few tools to negotiate a better and more lucrative agreement.

The most powerful weapon for negotiating the most favorable agreement is to use a license agreement instead of a lease. Chief among the owner-licensor's rights in a license relationship is the right to revoke the license "at will" and to use "self-help" to remove a defaulting licensee from the licensed premises without having to endure months or years of lengthy and frustrating litigation to regain possession of valuable real estate.

License Versus Lease

License agreements are perfect for laundry room agreements. However, the parties need to do more than title the agreement a license. Whether an agreement will be deemed a "license" or a lease will depend on the presence or absence in the agreement of the three essential characteristics of a real estate license: (1) a clause allowing the licensor to revoke "at will;" (2) the retention by the licensor of absolute control over the premises; and (3) the licensor's supplying to the licensee all of the essential services required for the licensee's permitted use of the premises.

Courts have found so-called licenses actually to be leases where any one or more of these characteristics are either missing from the agreement altogether or not sufficiently present in the powers retained by the licensor. However, the less control given the licensee, the more likely the agreement is to be a license, because a license offers no autonomy, but merely allows a party to render services within an enterprise conducted on premises owned or operated by another, who has supervisory power over the method of rendition of the services. Ergo, license agreements perfectly fit the bill for a laundry room agreement. First, the building owner wants to be able to revoke the agreement at will. Second the owner stays in control of the premises and does not surrender absolute control over the premises. Third, the owner supplies all of the essential services, including access to water, utilities and the items necessary to operate the laundry machines.

Even with these prerequisites, careful drafting of appropriate license agreements will be required. Building owners will also have to make judgments about the commercial feasibility of obtaining licensees who are willing to accept license agreements with "at will" revocation clauses. If their licensee occupants do not "cure" their default, the licensees will be subject to peaceable self-help eviction from the licensed premises swiftly and without further ado. Yet, it bears repeating that if the license is not "at will," it is not a license and the owner is stuck with all of the rigmarole attached to removing an ordinary tenant.

Revenue Agreements

Although no limitations exist on means to make money from laundry room contracts, there are typically four contractual designs. The most basic form consists of the laundry company paying the building a fixed rental fee to put its machines in the building's laundry room. Under this scenario, the laundry company keeps the earned revenue from the washers and dryers. When determining a rental fee, the parties will consider the number of units in the building, the type of residents (ratio of children versus adults), and the cost of washing and drying. Laundry rooms in buildings with numerous young families of three or more persons usually bring in more money than buildings of predominately single or elderly residents.

Another option for the laundry company is to pay the owner a percentage of revenue earned from the machines each month. Under this scenario, the laundry company and the landlord share the revenue from the washers and dryers each month. Many times the landlord will keep 50% to 70% of the machine's laundry room profits. In this scenario, both the landlord and the laundry company make money when the laundry room is profitable, and there is incentive for both parties to keep the room running well.

A third option allows the building to collect a percentage of revenue after "remuneration." This agreement allows the laundry company to "remunerate," or retain any revenue from the laundry room each month until a certain set amount has been collected from the machines. Only after the laundry company earns the set fee is the landlord entitled to get paid the remainder from collections. For example, the term might read, "the Company agrees to pay the Landlord a commission of 90% of all revenue collected in excess of \$2,000.00 per month, and will be adjusted for refunds and staff allowances." In this scenario, the building only makes money when the laundry room earns over \$2,000.00 in a month, and does not get paid at all in months that the laundry room brings in less than \$2,000.00.

Lastly, the parties may opt for a combination of a rental fee *and* a percentage of revenue. This is a favorable option for landlords because they will have a steady income each month, and there is always the potential for additional profit. For example, if the laundry company pays \$200.00 per month in rent, and the monthly revenue exceeds that amount, the building will get a percentage of the income in addition to the \$200.00. Some contracts that we have collected over the years include the following revenue provisions:

- Rental Fee

“Laundry Company shall pay Landlord a rental fee of \$1,500.00 per month.”

- Percentage of Revenue

“Laundry Company shall pay to Landlord 50% of the gross receipts.”

- Percentage of Revenue after Remuneration

“The Laundry Company agrees to pay the Landlord a commission of 100% of all revenue collected in excess of \$1,250.00 per month.”

- Rent & Percentage of Revenue

“Laundry Company shall collect all monies from the laundry equipment and pay Landlord the amount of \$3,000.00 per month. Additionally, Laundry Company shall pay 90% of income in excess of \$3,000.00 to the Landlord each month.”

In any arrangement calling for the laundry company to pay some percentage of its income from the machines, there must be clauses in the agreement that control how the funds are collected from the consumers and, even more importantly, how the funds are accounted for by the laundry company. Properly drawn agreements have clauses calling for standard accounting practices with the owner entitled to perform periodic audits.

Appliances and Improvements

The contract should specifically state that the laundry company will install brand new equipment, not merely reconditioned machines or parts. The exact model and description of the machines must be stated plainly in the contract. Also, any improvements to the laundry room that were promised by the laundry company during negotiations, such as painting or new flooring, must be written into the contract exactly as the parties understand them. It should, for example, be specifically stated that the laundry company will paint and scrape two times, and that all paint and tile colors will be subject to the building owner’s approval. Other items that should be requested to be supplied by the laundry company include installing two laundry carts with permanent press poles, seating and folding tables, drop ceiling tiles, and instructional signs.

It is a sad fact of life that laundry rooms share with elevators and parking garages the cruel distinction of being among the most common places for the occurrence of a rape between strangers. Both to meet a basic human need and to avoid potential lawsuits arising from such an atrocity, a laundry room contract should contain specific language requiring the laundry company to install and maintain basic security measures like cameras, key cards, unbreakable transparent doors, bright lighting, panic buttons, and emergency telephones.

Best Working Order Clause

It is vital to include a provision that requires the laundry company to install new, up-to-date equipment if a machine breaks, or if the building owner feels that a machine does not operate properly. Additionally, contracting for energy efficient equipment is going to save the building owner money; so this should be negotiated for as well. An example of an effective clause is, “laundry company shall use the most energy efficient equipment available and all equipment shall be maintained in top working condition in order to prevent waste of energy resources.”

Machine Temperature

One of the ugly “secrets” of some bad apple laundry room company people is to lower the temperature of the drying machines in order to force the user to pay more money to dry the laundry. Ergo, adequate temperatures should be monitored.

Term

A standard term for laundry room contracts is between six to ten years. If not using a license agreement, the term is one of the most important elements of the agreement and better revenue terms should be extracted in exchange for a longer contract agreement.

Service Requests

Laundry room contracts should include a provision requiring the laundry company to respond to service requests within twenty-four hours, on a seven-days-a-week basis with a response time within four hours of a receipt of a call. The laundry company should also acknowledge that a failure to process service requests in a timely manner will result in termination of the agreement. A cell phone and landline phone number should be included in the contract and updated in writing when an employee or phone number changes. When a failure to respond to defective machine complaint occurs frequently, a well negotiated provision in the contract allows the building owner to terminate the contract. In addition, machines that frequently fail should be required to be removed and replaced at no cost to the building owner.

Maintenance and Access

The contract should specifically spell out what the procedure will be for the maintenance of the machines. The contract must address the following issues in specific detail: Who has permission to enter and repair equipment, how they will get into the building during late-night or weekend hours, and what is to be the protocol for an emergency repair. Laying out these terms specifically in the contract will prevent later disputes between the parties. Instructional seminars on using the machines should also be included in the contract so the building’s residents understand the proper usage of the machines, technology, and safety features. Failure of tenants to take advantage of these seminars can serve as a defense to lawsuits brought for any kind of laundry room related loss or injury.

Change of Ownership Clause and Demolition

A change of ownership and demolition clauses cancelling the contract should be negotiated into all laundry room contracts as the inability to demolish or sell the building and change its use could interrupt the sale and better use of the building. In addition, a building buyer might be turned off by a laundry contract that comes with the sale.

Amenities and Vent Cleaning

Owners’ counsel should seek to have the laundry company provide folding tables, drying racks, and seating areas. The owner should also be entitled to perform inspections to ensure cleaning and repair of existing vents. Recall that it is not enough to have such a

right. One must actually avail oneself of that right since lint in the venting systems can present fire hazards.

Insurance Provision

An insurance provision with the following language should be negotiated into the agreement (the following was taken from Adam Leitman Bailey, P.C.'s Laundry Service Agreement)

: Commercial General Liability – The policy shall provide a \$_____ combined single limit for Bodily Injury and Property Damage, including Products Liability, Contractual Liability, Water Damage, Legal Liability, and all standard policy from extensions. The policy must provide \$_____ general aggregate (per location) and be written on a Blanket basis, must be endorsed to cover the indemnification specified under this paragraph. Licensee shall endorse policy to include the Licensor as additional insured. Definition of additional insured shall include all members, officers, directors, employees and agents representing the Licensor. Coverage for an additional insured shall apply to agents representing the Licensor. Coverage for an additional insured shall apply on a primary basis irrespective of any other insurance, whether collectable or not. Licensee shall deliver to Licensor a certificate of insurance evidencing such insurance and naming Licensor as additional insured within five (5) days of the date of this Agreement. Licensor shall not under any circumstances be responsible for fire, theft, mischief, pilferage or damage to the coin and/or card metered laundry equipment or any other equipment or materials installed or left by Licensee at the Premises or caused to the premises by Licensee equipment or employees; such damage and injury shall be the responsibility of Licensee and Licensee shall indemnify Licensor against any other claims.

The laundry company's insurance policy should also be inspected by building owner or management. Most laundry companies have a general liability policy, covering basics like personal injury liability and product liability. The size of the policy varies in amount based on the size of the company. Any vending company should be ready to present an adequate certificate of liability insurance to owners.

Indemnification Clause

Every contract should include a clause that indemnifies the building against any personal injury claims and all other lawsuits arising from the laundry company's negligence, intentionally wrongful acts or omissions, violations of any law, or material breach of contract. A favorable clause will also indemnify the building against damage to a tenant's property by the laundry machines. The contract should also require the laundry company to defend, cure and indemnify the building owned for any violations for sanitation and building code violations concerning the machines and space.

Clauses To Be Removed From Contract: Automatic Renewal and Right of First Refusal

There has been a significant amount of litigation in recent years created by automatic renewal and right of first refusal clauses. In 2005, the First Department invalidated such a clause in *Inwood Park Apartments, Inc. v. Coinmach Industries, Co.* When a Manhattan co-op decided not to renew their laundry contract, the laundry

company refused to remove its machines from the building, claiming that the right of first refusal entitled them to match the bid of any laundry service that tried to take over. The court found in favor of the co-op, stating that without a time restraint, the renewal clause was an “unreasonable restraint” on the alienation of property. The court opined that if the renewal right had a time restriction, it might have been valid [Inwood Park Apartments, Inc. v. Coinmach Industries, Co., 22 A.D.3d 250 (1st Dept. 2005)]

.¹ No building owner should allow an automatic renewal of the contract of sale or a right of first refusal clause in the contract. Further, as a precautionary measure the landlord can insist on a provision that specifically states there is no right of first refusal.

Clauses To Be Removed From Contract: Arbitration Clause

At the present time, arbitration clauses have been hotly debated by lawyers and an argument could be made for seeking arbitration for disputes. From the building’s point of view, there are no advantages for arbitration clauses in laundry room contracts and such clauses should be stricken from the contract. First, the arbitration process can be expensive for landlords as the costs of paying an arbitrator and governing body costs thousands of dollars and many disputes involve small sums of money. Additionally, an arbitration hearing cannot produce equitable relief cancelling a contract or forcing the removal or replacement of machines and therefore such a provision is ineffective. This is not to mention the usual deficits of arbitration -- lack of both an appellate process and discovery.

Clauses To Be Removed From Contract: Minimum Compensation Requirement

Such a clause allows the laundry company to change or reduce rent payments to the building owner if the machines’ revenue drops below a certain level. Laundry companies seek to place this clause in the contract to reduce their financial loss if the laundry room is not profitable. Similarly, some contracts will include a “vacancy rate” provision which allows the laundry company to reduce the rent paid to the landlord if too many apartments become vacant. Building owners should attempt to strike or remove such clauses from the contract.

Conclusion

Savvy business owners should not regard their laundry rooms as mere icing on the revenue stream cake. Laundry rooms can produce a nice source of additional income, but vastly more effectively if the building owner takes the initiative to have the operating agreement drawn on the owner’s terms, where the insistence on some basic principles can simultaneously increase the owner’s income and hedge in liabilities and losses.

Adam Leitman Bailey is the founding partner and Dov Treiman is the landlord-tenant managing partner of the AV rated Manhattan firm of Adam Leitman Bailey, P.C. Lindsay Garroway, an intern at the firm substantially assisted in the research for this article.

Article published in the January 2009 issue of the New York Housing Journal, a newsletter published by the Community Housing Improvement Program. Article reprinted with permission of the CHIP, a trade association of apartment building owners and managers. For more information about CHIP please visit the website at www.chipnyc.org or call the office at (212) 838-7442.

Tel (212) 838 7442 / Fax (212) 838 7456 / www.chipnyc.org