

“My landlord wants me to sign a personal guaranty . . . should I?”



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My brother, a chef, has been looking to open his own place for a number of years now. He tells me that when he finds the perfect space, he is going to jump on it. If that happens, I'm sure that I will get a call from him asking if I have time to review his lease. He will tell me that it's the perfect space and that I need to take only a "quick look." He also will probably tell me that, because he's taken my advice and set up his business as a limited liability entity, the landlord wants him to sign a personal guaranty. He will want to know what that means and whether he should sign it. Here's what I'll tell him:

Landlord POV

A *personal guaranty* of a lease is a promise from a "guarantor" (typically, the owner of the business) that, in the event of a breach of the lease, the guarantor will make good on the tenant's promises. For example, if the tenant fails to make rent, the landlord can sue the guarantor to collect it. If successful, the landlord will get a judgment against the guarantor and be able to execute against the guarantor's personal assets to collect. So much for a limited liability entity, right?

But that's the point. Many landlords are not going to want to lease space to a start-up restaurant with no track record of success. If the restaurant fails, the landlord is going to be left with space that is built out like a Mediterranean castle ("Nice, but not stuffy," says my

brother). Suing the restaurant won't work because it's gone out of business. On the other hand, suing my brother might work. He owns a house and has various investments. By suing to enforce the guaranty, the landlord can force my brother to liquidate his assets to pay up. The only defense to the landlord's action is likely to be personal bankruptcy. This legal route would be rough for my brother, but it also can be bad news for the landlord: joint business/personal bankruptcies can tie up a landlord's space and afford him little prospect of getting paid, or they can trigger a long wait for restoration.

Tenant's Option

So what are the options? I will suggest to my brother that he try to negotiate a *good guy lease guaranty* with the landlord. A "good-guy" guaranty is different from an unlimited personal guaranty in that the guarantor's liability is nullified if he delivers the vacant space back to the landlord and pays the rent due up to the date of delivery. If the tenant doesn't vacate, the guarantor can be sued personally. Once the landlord gets the space back, however, the guarantor is off the hook.

The benefits to my brother are obvious, but how does the landlord profit? If landlords are able to insist on—and get—personal guaranties from

tenants, why would they ever accept a "good guy" limitation? The simple answer is that they probably won't. This is where my brother gets really mad at me. He has found the "perfect" space and he does not want to hear me tell him about the risks. A smart tenant will not commit *emotionally* to a space until an acceptable lease has been signed. Negotiating such a lease can be done quickly, but it also must be done intelligently.

If you are reading this column and you are not my brother, be sure to review your leases and guaranties with your real estate attorney. A space isn't "perfect" if your lease terms are not acceptable. In addition to the "good guy limitation" I discuss here, guaranties can be limited in many other ways, including a specific dollar cap or length of time. The best negotiating strategy will depend upon the facts of your situation and the relative bargaining strength of the parties. Remember: Don't be afraid to walk away.

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