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SCAFFOLDING

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to occupy an inviting storefront that produces sales, enabling them to pay the high rents. So if the City requires scaffolding—or the landlord voluntarily installs it, which is conceivable though not likely—then retail tenants aren't getting what they paid for. They're getting instead a hybrid between high-value streetfront retail space and low-value dark space in the basement.

If a tenant gets less desirable space than they paid for, should the price of their space drop? Some retail tenants think so. When they negotiate their leases, they demand the right to a substantial rent reduction if scaffolding stays up for more than a short period of time, or a certain number of days in any year. And the rent reduction may get larger if the scaffolding occurs in the holiday season or other peak seasons.

In a landlord's market, a landlord can just say no. The landlord can rationally argue that a landlord needs steady and reliable cash flow so the landlord can pay its mortgage. In a more tenant-friendly market, like today's, tenants may have little sympathy for the landlord's problem, again arguing that if the retail space is worth less because of scaffolding, then the retail tenant should pay less. The tenant is not prepared to shoulder the risk of economic injury caused by scaffolding.

A landlord will also argue that scaffolding is typically required by law, so it's an external and uncontrollable force like the wind and the rain. Again, in a strong landlord's market, the landlord might prevail. But in a market where landlords have to try harder to entice tenants to sign leases, the tenant might prevail. Even if the scaffolding is like the wind and the rain, a tenant wants their landlord to have every incentive to get rid

of it as soon as possible. A nice healthy rent reduction will focus the landlord's energies very effectively toward that end. It encourages the landlord to move quickly to complete whatever work led to the scaffolding. The landlord might even hire overtime help or incur other extra costs to minimize the time the scaffolding remains in place. A landlord may claim it already has every incentive to do that. The tenant will respond that the landlord should have even more incentives.

Whether a tenant wins or loses the argument for a rent reduction, that's not all there is. When a tenant negotiates the "scaffolding clause" in the lease—something that didn't exist a few decades ago—they also should consider the possibilities presented by scaffolding. For example, it can be high or it can be low. It can have decent lighting, or it can have whatever minimal lighting the City requires. Its support structures can impede pedestrians trying to get to the tenant's store, or they can allow maximum circulation in all directions. In its lease, the tenant should try to get as much comfort as it can on all these things.

A landlord may see scaffolding as an advertising opportunity. A tenant may have the same idea—limited to advertising for the tenant's business, designed by the tenant, but paid for, installed, and lighted at the landlord's expense. That too can go in the lease, along with requirements for prior notice of scaffolding, to give the tenant time to arrange signage.

When a tenant negotiates a new lease in today's market for retail space, the tenant may have better luck with all of this than it would have had a few years ago.

On any given day, miles of New York City sidewalks look like dungeons because of sidewalk bridges, sidewalk sheds, and scaffolding the City requires building owners to install to protect pedestrians from hazards. The widespread requirements for all these installations (collectively, "scaffolding" for our purposes) began in the early eighties after something fell from a building and killed a pedestrian. The requirements have grown over time.

Undoubtedly the City has performed a cost-benefit analysis and concluded that the lives saved are well worth the miles of scaffolding, to say nothing of the cost of installing, renting, and removing it all. After three decades of ever-growing scaffolding, the City probably has accumulated a long list of things that fell from buildings, but landed on scaffolding and hence didn't kill pedestrians.

Although scaffolding surely saves people's lives, it also surely kills retail businesses. Retail businesses depend on visibility and foot traffic. If people walking past can barely see a business and equate it with a gloomy dark dungeon, they're less likely to go in and spend money. So business suffers. If the scaffolding stays up long enough, which it often does, the business might fail.

When retail tenants agree to pay high rent rents, they buy visibility. They expect