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What must the landlord do when the landlord retakes possession of the premises for the account of the tenant?

Reasonable good faith efforts to relet the premises. Many landlords are unaware of the affirmative duty to undertake reasonable good faith efforts to relet the premises if they take possession of the premises for the benefit of the tenant. Specifically and as previously indicated, the landlord has three (3) options.

1. Retake possession of the premises for her or her own benefit.
2. Retake possession for the account of the landlord.
3. Sue on a monthly basis for any rentals due.

4-WAY, INC., Appellant, v. Toby Bryan, 581 So. 2d 208 (2DCA 1991)

We have already eliminated the third option, which is rarely used by practitioners or seen in Florida Courts, absent some unusual circumstances. If the landlord elects the first option, to wit: retaking possession of the premises for his or her own benefit, then in such event landlord does not capture future rentals. The landlord may take whatever use it may have as long as it has properly retaken possession of his or her own premises.

However, the situation which imposes a specific duty upon the landlord is when the landlord has retaken possession of the premises for the benefit of the tenant and account of the tenant, seeking to hold to the tenant and/or the guarantors responsible for the remainder of the lease. Under such circumstances, the landlord has an affirmative duty to make good faith efforts to relet the premises. Vereka Investments N.V. v. American Investment Properties, Inc. 724 F.2d 907 US 11th Circuit (1984).

The non-residential tenancy statute, applicable to commercial leases, is silent on the landlord's statutory duty in such circumstances. An example and a good analogy is the provision specified in the residential tenancy statute, Florida Statute §83.595, which specifically identified the guidelines for a residential landlord to relet premises as follows:

“...the landlord has a duty to exercise good faith in attempting to relet the premises, and any rent received by the landlord as a result of the reletting must be deducted from the balance of rent due from the tenant. For purposes of this subsection, the term “good faith in attempting to relet the premises” means that the landlord uses at least the same efforts to relet the premises as were used in the initial rental or at least the same efforts as the landlord uses in attempting to rent other similar rental units but does not require the landlord to give a preference in renting the premises over other vacant dwelling units that the landlord owns or has the responsibility to rent”

The format and procedure of §83.595 is consistent with the case law identified by the Supreme Court in the case of Kanter v. Safran 68 So 2d. 553 (1953) and followed by Vereka Investments N.V. v. American Investment Properties, Inc. 724 F.2d 907 US 11th Circuit (1984) in which the Court indicates:

“In Kanter v Safran, the court stated: (This case) eliminates any thought that the lessor is necessarily required to seek an assignment of the defaulting lessee’s specific interest or to sell only the remaining term of the original lease, since that term is “at an end”. He is required only to recoup only what he can in good faith, consistent with his own interest as well as that of the defaulting lessee.

Kanter v Safran, 82 So. 2d 509, 509 (Fla 1955). Although not specifically applicable to this case, Kanter indicates that Florida law requires a good-faith effort to mitigate damages as opposed to requiring mitigation of damages by a specific method.”

In Vereka Investments, the court found that the commercial landlord was proper in its procedure and met the good faith requirement since it hired a property management firm, Coldwell Banker, who followed appropriate procedures. The Court specifically cited the use of Coldwell Banker and indicated as follows:

“Because the district court found that Coldwell Banker’s management had “been efficient and successful”, Vareka satisfied Florida’s requirement that the lessor mitigate damages and thus, was not precluded from recovering damages.”

The Vereka Investments case is consistent with Hudson Pest Control, Inc. v. Westford Asset Management 622 So. 2d. 546 (5 DCA 1993) which identified the fact that the landlord has the duty to mitigate tenant’s damages and to make a good faith effort to relet the property at a fair rental. See also Joseph S. Arrigo Motor Co. v. Lasserre 678 So. 2d. 396 (1DCA 1996).

Another Florida case which provides direction for a commercial landlord in a situation where they are seeking to obtain accelerated rentals and have the legal duty as a

commercial landlord to use commercially reasonable efforts to relet the premises is the case of Fort Lauderdale Joint Venture Limited Partnership v. Sander and Serafino 613 So. 2d. 133 (4DCA 1993). In this case the Court identified circumstances in regards to a mall owner and the commercial mall owner's efforts as landlord to relet the premises after a tenant defaulted. In the Fort Lauderdale Joint Venture Limited Partnership, the mall owner used standard procedures for reletting, the Court stated:

“The only substantial, competent evidence regarding the efforts of the landlord was that it acted according to its standard procedures which were reasonable and done in good faith.”

What this means is that if specific procedures are set forth by commercial landlords and if they are followed, the procedures may be considered an appropriate, good faith, reasonable effort. Why is that important? The contrast would be the difference between a commercial landlord who owns a free standing warehouse v. a commercial landlord who owns a shopping center mall with multiple tenants.

Free Standing Warehouse – Re-Letting Example: In the situation in which there is a free standing warehouse with a single tenant, that landlord can utilize the same efforts to relet the premises at fair market value. For example, if the tenant had been renting the premises at \$12.00 per square foot plus CAM and the current fair market value rents indicate that the average fair market rent would be \$10.00 per square foot plus CAM, the landlord for the single tenant free standing warehouse could in fact employ a situation in which the landlord relets the premises at \$10.00 per square foot plus CAM. This can be accomplished by simply advertizing the premises for this location and seeking to hold the tenant liable if the landlord is unable to relet the premises at the \$10.00 per square foot plus CAM.

In that single tenant free standing building, the landlord would have a simple and easy procedure to follow. The landlord is simply trying to relet the premises for the fair market value or whatever it could get, not necessarily requiring the landlord to advertize the premises for the same amount or precluding the landlord from charging a lesser amount. Where the problem occurs is in some cases in which a landlord is seeking to take advantage of the tenant by attempting to relet the premises at a significantly higher per square footage rental rate than fair market value. Utilizing our example in which \$10.00 plus CAM is fair market value for the free standing warehouse, the landlord might take steps to try to profit from the breach, holding the tenant liable for the \$12.00 per square foot plus CAM rent and then seeking to get a higher rent, for example \$15.00 per square foot plus CAM. Under this example, a commercial tenant might take steps to claim that the landlord was unreasonable and did not act in good faith since the landlord simply tried to generate a profit when it should have known that the premises could not be rented for such higher amount. The landlord is then penalizing the tenant who would be responsible for the \$12.00 per square foot plus CAM because the landlord did not want to take a lesser sum and was seeking to actually profit from the tenant's circumstances.

The commercial tenant could argue that should the landlord have rented the premises out at \$10.00 per square foot, the commercial tenant would be responsible for the additional \$2.00 per square foot for the remainder of the lease which would be a fair and equitable format. However, by the landlord seeking to lease the premises for \$15.00 per square foot, it results in the tenant bearing the burden of a \$12.00 per square foot plus CAM damage. This could be argued as a penalty since the landlord has a duty to mitigate its damages by reletting in a commercial reasonable manner.

Trying to relet the premises for higher than per square foot rental rate would not be considered reasonable under the single free standing warehouse example.

Multi – Tenant Commercial Center – Re-Letting Example

The more sophisticated and more detailed analysis arise when a commercial landlord has to relet his or her premises at a multiuser location such as a shopping center or a mall in which rents are published. In such case and as identified in the Fort Lauderdale Joint Venture case, the commercial landlord can utilize the same procedures that it has in place. Offering the premises at a discount far below what other units would be leasing for could be damaging to the commercial landlord and in fact would result in the commercial landlord advancing the interest of the tenant over the interest of the landlord. By utilizing the same example, assuming that all fair market rents at the shopping center are \$12.00 per square foot plus CAM, and that the landlord had other available units to rent all of which were listed at \$12.00 a square foot. Notwithstanding the fact that the landlord might be able to dispose of the defaulting commercial tenant's premises which would reduce that specific commercial tenant's space to \$10.00 a square foot or below, this nonetheless would not be consistent with the case law or with landlord's own procedures. Reducing only that particular unit's square footage rental rate would not be "consistent with the landlord's own interest as well as the defaulting lessee". See Kanter v. Safran.

In effect the above example would advance the interest of the defaulting commercial tenant over the landlord's other vacant space which is not a requirement of a commercial landlord. This is test of balancing interests and in this particular situation involving a multi tenant center, the commercial landlord is advised to seek legal counsel to guide the commercial landlord through the complicated format and procedure, which should ensure that the commercial landlord is not denied the right to pursue future damages for its commercial lease.

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