

DECEMBER

2008

KEVIN F. JURSKINSKI, ESQ.
COMMERCIAL LEASE NEWSLETTERS

In lieu of the December 2008 Commercial Lease Newsletter, I am publishing the first portion of a seminar which was conducted at the embassy suites on December 11, 2009 and attended by approximately ninety-six (96) commercial property managers and commercial property owners. As indicated in the outline, this is an outline of a presentation of a seminar and is not legal advice for the recipients of this information. The January Newsletter will contain the second half of my presentation for your reference.

1. CASE LAW UPDATE – NEW AND INTERESTING CASES

NEW CASES:

Mitigation Efforts of Landlord in the event of a default of tenant

Fairway Mortgage Solutions, Inc. v. Locust Gardens, 988 So. 2d 678 (4 DCA 2008).
(Robert C. Malt & Company v. Carpet World Distributors, 763 So. 2d 508 (4 DCA 2000). Good faith.

Uscardio Vascular, Inc. v. Florida Department of Revenue, 33 Fla. L. Weekly D 2252. (Sales Tax Issue on “Rent”)

Subscribing witnesses.

Skylake Insurance Agency, Inc. v. NMB Plaza, LLC, 33 Fla. L. Weekly D 2215, September 17, 2008. (Witness on lease; signature by officer of LLC or corporation)

Skyline Outdoor Communications, Inc v. James, 903 So.2d 997 (1 DCA 2005).
(Interested party cannot be subscribing witness)

CURRENT CASES OF INTEREST

FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES (“FDUTPA”)

Beacon Property Management, Inc. and Ernest W. Willis, Appellants, v. PNR, Inc., a Florida Corporation d/b/a Goodfellas Restaurant Appellees 890 So. 2d 274; (Florida) (4 DCA 2004). Rehearing denied by Beacon Property Management v. PNR 2005 Fla. App. Lexis 1458 (4 DCA 2005)
(Tort liability per F.S. 501.201 et seq. as against commercial property managers and commercial landlords)

FLORIDA’S REAL ESTATE COMMISSION LEASING ACT – F.S. 475.801
(see handout material for statute and form notice)

LANDLORD WAIVER OF LEASE PROVISIONS BY CONDUCT

Miracle Center Associates, etc., vs. Scandinavian Health Spa, Inc., etc., 29 Fla. L. Weekly D 1636 (July 14, 2004) B. (waiver of CAM rental)

LANDLORD TORT LIABILITY FOR INJURY

Nita Haines v. Dania Corner, Inc. 920 So. 2d 1289; 2006 Fla. App. (4 DCA 2006)
(latent or dangerous defect; appropriate notice required)

LANDLORDS DUTY TO PROTECT TENANT FROM “REASONABLY FORESEEABLE” CRIMINAL CONDUCT

T. W. and K.W. v. Regal Trace, Ltd. 908 So. 2d 499 (4 DCA 2005)
(security issues)

AMBIGUITIES IN THE LEASE

PAROLE EVIDENCE ADMISSABLE TO ADDRESS AMBIGUITIES

3679 Waters Avenue Corporation v. Water Street Ovens, Ltd. 779 So. 2d 349 (2 DCA 2000) (ambiguous lease clauses)

EVIDENCE OF ORAL AGREEMENTS OR CONDUCT ADMISSIBLE TO MODIFY WRITTEN LEASE

Bron White d/b/a Calypso Café & Seafood Grille v. Ocean Bay Marina, Inc., 778 So. 2d 412 (3 DCA 2001) (denial of Summary Judgment to allow evidence of Landlord conduct to modify lease term)
(Conversation Log in packet)

SHELL CORPORATION – ACCEPTABLE AS A LESSEE

Geigo Properties, LLP v. R. J. Gators Real Estate Group, Inc. 28 Fla. Weekly D1443 (4 DCA 2003). (non-collectible entity formed to act as Tenant)

EXCLUSIVITY CLAUSES

When is a bagel not a donut? LPI / Key West Associates, Ltd. and Southernmost Donut Co., Inc. v. Sarah Luna, Inc. 749 So. 2d 564 (3 DCA 2000)
(strict interpretation of lease exclusivity clause)

2. REAL ESTATE ECONOMY & DEFAULTS

INTRODUCTION TO EVICTION ISSUES

COMMERCIAL LEASES

Two of the most often asked questions by a commercial Landlord are:

“Can I change the locks?” or “Can I lock out the Tenant?”

In the event of default and prior to lock out:

- Be proactive
- Last resort – three day notice
- Get modifications in writing signed by two witnesses
- Modification of lease containing provisions for additional defaults being an automatic lease default
- Additional collateral or guaranty
- Lock outs only authorized in accordance with F.S. 83.05

- A. F.S. 83.05 provides that Landlord shall recover possession of the surrendered premises only:
- (1) In an action for possession under 83.20 in which the right of possession is determined.
 - (2) When Tenant has surrendered possession of the premises to Landlord.
 - (3) When a Tenant has abandoned the premises.
- B. Defense of abandonment - as far as “abandonment” is concerned, property management/Landlord should consider the following:

In the absence of the actual knowledge of abandonment, it shall be presumed for purposes of F.S. 83.05(3) that in the absence of actual knowledge a Tenant is deemed to have abandoned the premises if:

- (1) Landlord has reason to believe that the Tenant has been absent from the rented premises for thirty (30) consecutive days; and
- (2) The rent is not current; and
- (3) A notice pursuant to 83.20 has been served and ten (10) days has elapsed since service of such notice.

ELEMENTS FOR EVICTION

Sun Ae Boudreau v. M & H Food Corporation 895 So. 2d 501 (2 DCA 2005)

- A. The parties have an agreement requiring the Tenant to pay the Landlord rent for the use of the property.
- B. Tenant defaulted in the payment of the rent.

- C. Three days notice requiring the payment of the rent, or the possession of the property, was served on the Tenant. [Unless a longer period in lease or if waived “non notice provision”]
- D. The Tenant failed to pay the rent or deliver possession of the property within three (3) days (or longer period per lease).

RIGHT TO WAIVE NOTICE UNDER F.S. 83.20

SERVICE OF THREE-DAY NOTICE

TENANT RIGHT TO WITHHOLD RENT

Vance Realty Group, Inc., Appellant v. Park Place at MetroWest, Phases Six and Seven, LTD., a Florida limited partnership, Park Place Development Company, and David J. Townsend, Appellees 909 So.2d 516; 2005 Fla. App. Florida Statute 83.201

1. Tenant can withhold rent;
2. After prescribed written notice to the Landlord that the premises are untenable; and
3. The Landlord fails to make the specific repairs within twenty (20) days.