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COMMERCIAL LEASE NEWSLETTER

**Additional Problems Facing Commercial Property Managers During
Troubled Economic Times: Payment Arrangements by Tenant**

A common occurrence facing property managers in their attempts to do lease default workouts is for the tenant to tender a partial payment. I have previously written on the subject of conduct being construed against the landlord and potentially modifying the lease agreement by the landlord's conduct and interaction with the tenant. See my June, 2009, commercial lease newsletter (www.kfjlaw.com/Assets/Category/0001/0002/03/June_2009.pdf)

I have also previously addressed the procedure and format under Florida Statute §83.20, to provide notification to the tenants of a default in the lease and the demand for past due rentals as a precursor to enable the landlord to commence an eviction suit. See my March, 2007, commercial lease newsletter (<http://www.kfjlaw.com/docs/Newsletter-March-2007.pdf>)

A summary of those two articles indicates that the landlord:

- a) Should provide that any agreement with the tenants be specifically set forth in writing, signed by both the landlord and tenant, and duly witnessed; and
- b) Should provide that any demand for rent to trigger an eviction action must identify specifically "rent" (as defined under the lease) and demand only that amount then due and owing specifically in a written notification and provide the tenant with a minimum of three-days notice (pursuant to Florida Statute §83.20 or longer depending upon the lease). "Rent" for purposes of an eviction action is consideration paid, usually periodically, for use or occupation of property Cascella v. Canaveral Port Authority, 827 So. 2d 308 (5 DCA 2002).

Many commercial landlords now are faced with the problem of initiating demands for outstanding rentals. The tenant, either in a good-faith attempt or otherwise, then tenders less than the full amount demanded in order to cure the default without paying the full amount so demanded. For example: The tenant fails to pay two (2) months rent at a \$1,000.00 per month. The rent as defined in the lease is for \$1,000.00 together with late charges being construed as rent with the landlord then being able to recover a \$1,000.00

for rent, \$50.00 as late charge per month. With the lease payments in default per the above example, the tenant is responsible for paying \$2,100.00 in “rent” which includes the base rent and the late charge construed as additional rental payments under the lease. (Note: In the event a late charge or other recovery item is not specifically defined as “rent” in the lease, it cannot be demanded pursuant to Florida Statute §83.20. Although it still may be due and owing to the landlord such additional cost items is defined as “rent” by the lease cannot act as a basis for a demand under Florida Statute §83.20)

Getting back to our example: the landlord issues a Florida Statute §83.20 notice demanding the tenant pay the two months rent of \$2,100.00, within three days (not counting the day of service, weekends, or holidays) from the service of the Florida Statute §83.20 notice. The tenant, hoping to avoid being defaulted, tenders a payment of only one month rent without late charge, tendering in our example the sum of \$1,000.00 against the demand of \$2,100.00.

The non-residential statute in Florida, Florida Statute §§83.001 through 83.251, addresses specifically a waiver by the landlord in accepting full payment. Florida Statute §83.202 states as follows:

“Waiver of right to proceed with eviction claim.--The landlord's acceptance of the full amount of rent past due, with knowledge of the tenant's breach of the lease by nonpayment, shall be considered a waiver of the landlord's right to proceed with an eviction claim for nonpayment of that rent. Acceptance of the rent includes conduct by the landlord concerning any tender of the rent by the tenant which is inconsistent with reasonably prompt return of the payment to the tenant.”

Without question, if the tenant had paid \$2,100.00, accepted by the landlord (before or after the default) then in such event the landlord would be precluded from initiating an eviction action. In our case, however, the question then would arise: How is Florida Statute §83.202 construed when a tenant tenders only a partial payment in light of a demand for rent for the full amount. There are no specific cases directly on point. A case that partially addresses this particular point is the case of Philpot v Bouchelle, 411 So. 2d 1341 (Fla. 1st DCA 1982). In that case it states as follows:

“This court reversed the trial court and ordered a directed verdict for the lessor where the lessee was in default on its rent, but wished to exercise the option to purchase. The lessee in Philpot testified that he had substantially accomplished all the conditions of the lease and the option. The lessee, however, admitted that his rent payments [12] and the payment on a required note had been late, but testified that the lessor had accepted the late rentals “graciously.” There, this court held the lessor had not waived, by acceptance of tardy rental payments, the conditions necessary to the lessee’s exercise of the**

option to purchase where the lease/option agreement provided as follows:

The rights of the lessor under the foregoing shall be cumulative and the failure on the part of the lessor to exercise properly any rights given hereunder shall not operate to forfeit any of said rights.”

The case of Eskridge v. Macklevy, 468 So. 2d 337 (Fla. 1st DCA 1985) rev. denied, 478 So. 2d 54 (Fla. 1985), indicates that generally anti-waiver provisions in the lease agreement are enforced.

Accordingly, using our example in which a landlord has:

- a) A specific written lease agreement;
- b) A provision in the lease agreement which indicates non-waiver provisions;
- c) A properly issued demand notice for \$2,100.00; and
- d) Received a partial payment of \$1,000.00,

the suggested approaches for the landlord, are as follows:

- a) Notify the tenant that the tenant has failed to respond timely and in the full amount demanded of \$2,100.00;
- b) Indicate to the tenant that the landlord will accept the \$1,000.00, but only as partial payment;
- c) Reissue notification to the tenant that there is still the sum due and owing of \$1,100.00;
- d) Utilize the first notice as a basis to initiate an eviction action for non-payment of the notice under Florida Statute §83.20 or take a more conservative approach and reissue the Florida Statute §83.20 notice to the tenant, making demand for the \$1,100.00 that is due and owing. The landlord can indicate that, notwithstanding the \$1,000.00 payment, such partial payment and acceptance by the landlord was not conduct indicating a waiver of the demand and that acceptance of the \$1,000.00 payment was not enough to cure the default nor preclude the landlord from initiating an eviction action and declaring the lease in default.

This above approach is an approach based upon the litigation strategy to avoid a tenant claiming that the landlord waived the §83.20 notice and that for some reason the landlord, by acceptance of a lesser sum, indicated that the lease was cured and not in default.

From a pragmatic and business standpoint, especially in light of today's marketplace, a commercial property manager may want to utilize the opportunity to communicate with the tenant and receive the \$1,000.00 payment, indicate that it is not a waiver of the default, but use the opportunity as a platform to then negotiate to collect the balance of the \$1,100.00, using our example above. It seems prudent that in these troubled economic times that a commercial landlord first protect their legal rights and the litigation strategy in regard to this matter, while at the same time, considering the realities

of the situation recognizing that the goal is to bring the tenant current and have a continuous stream of rental income from the specific lease space in question.

The commercial landlord should avoid, at all costs, simply accepting the rent under some type of oral conversation (“oral handshake”) or some type of purported understanding with the tenant that the acceptance of the rent defers any right of the landlord to pursue an action to evict or that for some reason a partial payment would cure the entire default.

Any default (partial payment of rent situation) should be clarified specifically and in writing. The best approach is the aforementioned letter confirming the partial payment, acceptance of the payment and the non-waiver of the default, as well as a ratification of the lease provision containing such non-waiver provisions.

Note: The underlying assumption in all of this is that the landlord has a viable and well prepared lease agreement, specifically outlining the rights and duties of the parties, in the event of a default, in clear and concise terms and which also contains appropriate remedial clauses consistent with Florida Law.

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