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What remedies are available to the landlord and what election does the landlord have to make when a tenant breaches and the landlord retakes possession?

There are three (3) different remedies that a landlord can take and are provided for by law. In the event of a default by a commercial tenant, the landlord has a right, provided it complies with Florida Law to either:

- a. Retake possession for the benefit of the landlord.
- b. Retake possession for the account of and benefit of the tenant.
- c. Suing the tenant on a month to month basis.

Kanter v. Safran 68 So 2d 553 (Fla. 1953)

Eliminating the third option (which is generally not a practical approach for any landlord since the concepts of suing on a monthly basis is generally abhorrent to most practitioners as well as commercial landlords) there are two separate remedies.

Retaking possession of the premises for the benefit of the landlord. If the landlord simply chooses to take possession of the premises for its own benefit, the landlord is then deemed to have taken control of the premises for its own use and the lease would be terminated for all prospective obligations under the lease agreement. In such a case, the landlord would have the right (provided it had already properly taken possession of the premises) to simply seek to collect the commercial tenant's rent and other expenses that it may incur. Those available remedies are determined by the lease agreement and they may also include: interest, late charges, a damage claim to the subject premises, the deposit and attorney fees and costs if litigation is started.

Retaking possession for the account of the tenant. If the landlord is provided a formal notification that it has recaptured the possession of the subject premises for the account of and for the benefit of the tenant, the lease has not been terminated nor has the landlord taken possession of the premises for his or her own particular use. It must be

clear that the landlord does not engage in activities that will be construed or can amount to be actions for his or her own use. An example would be the commercial landlord taking possession of the premises for the account of the tenant but then utilizing it for storage, for use as an ancillary leasing office or for some other benefit which might be construed as utilization by the landlord for his or her own benefit. These actions negate the right of the landlord to claim that he or she took possession of the premises on the account of the tenant. Retaking possession and use by the landlord would eliminate the ability of the landlord to pursue a prospective claim against the tenant for accelerated rentals.

Accelerated Rentals. We previously discussed various aspects of the landlord taking possession of the premises for the account of and for the benefit of the tenant. Under such circumstances, the landlord would do so in order to claim against the tenant the damages that would occur after the tenant has vacated the subject lease premises. Again, for the landlord to do so, the landlord should take steps and specifically notify the tenant of his or her intent to retake possession for the tenant's account. The landlord should also notify the tenant that the landlord would be seeking to recapture prospective lease damages which could include accelerated rentals.

Accelerated rentals would allow the landlord, for the remainder of the term, to claim future rentals as damages. By way of example, assuming the tenant left a five (5) year lease after only two (2) years in occupancy and the landlord properly took possession of the subject premises for the account of the tenant, the landlord could claim three (3) additional years of accelerated rentals. The format and procedure is dictated by Florida Law that indicates prospective accelerated rentals the landlord is entitled to claim and capture, provided the landlord makes good faith efforts to:

- a. Relet the subject premises.
- b. Accelerate the outstanding rentals.
- c. Obtain a judgment. At the time the judgment is issued, the outstanding rentals are not only accelerated, but also reduced to their present value.
- d. Obtain judgment in favor of the landlord against the tenant and also reserve in such judgment the provision that if the landlord collects any rentals during the remainder of the accelerated terms, such rentals would be credited as against the tenant.

By way of example (utilizing a five (5) year lease which has been breached after two (2) years) the landlord could initiate suit, claim accelerated rentals for the remaining three (3) years and obtain a judgment for the rentals including court costs, damages and attorney fees and costs. However, the damage claim for the future rentals would have to be reduced to present value because of the entry of the judgment.

The judgment would need to provide a provision pursuant to Colonial Promenade v. Juhas 541 So. 2d 1313 (Fla. 1989) that any rentals to be received by the Plaintiff from the subject lease premises from the date of the entry of the final judgment through the balance of the remaining lease term ((3) three years in our example) must be deducted

from the accelerated rental award/judgment received by the Plaintiff and as determined by the Court. This format must be followed for a proper judgment to be entered.

Based upon the above and foregoing, it should be clearly evidenced that the landlord needs to have format and procedure in place to deal with prospective problems with the tenants. Employ that format and procedure, as well as have a specific strategy and plan on what to do from a business and pragmatic standpoint, and what is authorized under Florida Law. However, there are some provisions which dictate what a landlord must do in the situation of taking possession of the subject premises for the benefit and account of tenant, which will be covered next month.

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