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COMMERCIAL LEASE NEWSLETTER

What can a commercial landlord do legally in the event of a tenant default?

Last month we addressed pragmatic and business approaches that could be employed by a landlord in trying to salvage a defaulting tenant. However, once it is determined that the commercial tenant is not going to cure the default, then the landlord is faced with a number of decisions to make that require the landlord to know exactly what the he or she can legally do.

Possession of the premises: Volunteer, Surrender or Need for Eviction.

The landlord needs to determine whether the tenant is going to voluntarily surrender possession of the premises or whether the tenant is going to vacate the premises. This is an important decision since if the tenant is going to be unwilling to pay rent, the landlord needs to resolve the issue, recapture his or her premises and get the premises relet or at least available for reletting to minimize and mitigate the landlord's damages.

Abandonment of premises and "Self Help".

Generally in Florida self help is not allowed by a commercial landlord. This means that a commercial landlord cannot do a "lock out", retake possession, breach the peace or do anything to disrupt the tenant's occupancy without following the specific provisions provided for under Florida Law and the non residential tenancy statute, Chapter 1 of Florida Statute 83. That should be a mantra for all commercial landlords and tenants since most judges specifically abhor self help. With that said, there are certain limited exceptions to the landlord recapturing possession without the use of a court order. As indicated, those are specific and identifiable and need to be followed precisely to avoid any potential issues in reference to the actions of the commercial landlord.

Florida Statute §83.05. Narrow and Limited Right to Retake Possession.

Florida Statute §83.05 indicates that the commercial landlord may take steps to recapture possession of its premises under situations in which the tenant has actually abandoned the premises or there is a presumption that the premises have been abandoned by certain conditions. Abandonment is statutorily defined and allows the landlord to retake possession in certain circumstances.

In such a case, there is nothing to preclude the landlord from retaking possession when the tenant has actually abandoned the premises. "Actual abandonment" needs to be proved by facts, some of which might be considered to be abandonment when the tenant advises the landlord is leaving, removes all of its personal property and indicates that it is vacating and moving to another location. That would be a simple and easy to provide "actual abandonment" scenario. Additionally, abandonment may be presumed under circumstances in which the tenant has received a three (3) day notice (or longer notice under the lease, but in compliance with Florida Statute §83.20) and has not made payments to the landlord or made payments into the court registry. In such a case, many times the tenant simply takes steps and vacates the premises in response to a service of demand but sometimes the tenant will not communicate that abandonment.

Again, actual abandonment is going to be fact based, and recovery under such theory of abandonment or presumed abandonment must be substantiated in accordance with the statute.

Presumption of abandonment. The statute identifies a presumption of abandonment under the following circumstances.

"...(3)In the absence of actual knowledge of abandonment, it shall be presumed for purposes of paragraph (2)(c) that the tenant has abandoned the rented premises if:

(a)The landlord reasonably believes that the tenant has been absent from the rented premises for a period of 30 consecutive days;

(b)The rent is not current; and

(c)A notice pursuant to s. 83.20(2) has been served and 10 days have elapsed since service of such notice."

Again, the landlord has to be cautious when he or she makes a presumption that the tenant has abandoned to avoid termination of the lease, avoid having a claim for a lock out and avoid a counterclaim by the tenant for damages to tenant's business operations.

A detailed analysis involving eviction was outlined in my two previous comprehensive newsletters March 2007 and April 2007. With that said, there are still issues that need to be addressed in regard to an eviction action which include verification of whether a distress for rent will be put in place (which allows the landlord to claim on the personal property of the tenant) and whether the landlord needs to initiate eviction. If the landlord needs to initiate eviction, the landlord needs to also determine if the he or she will be taking steps to recapture the premises for their own benefit or for the benefit of the tenant.

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