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COMMERCIAL NEWSLETTER

LIABILITY OF A COMMERCIAL PROPERTY MANAGER UNDER FLORIDA'S UNFAIR AND DECEPTIVE TRADE PRACTICE ACT ("FDUTPA") (FLORIDA STATUTE §501.201 ET SEQ. ;PROTECTIVE MEASURES TO BE TAKEN BY A COMMERCIAL PROPERTY MANAGER AND FLORIDA'S COMMERCIAL LEASING LIEN ACT)

The Florida Supreme Court has issued a ruling in one of the very few commercial property management cases that has been announced in the last twenty-five (25) years establishing tort liability for commercial property managers. The ruling affords the commercial tenant the ability to recover damages under Florida's Unfair and Deceptive Trade Practice Act (501.201 et. seq.) against a property manager (as well as a Landlord) in a commercial lease setting. In the case of PNR, Inc. v Beacon Property Management 842 So 2d.773 et. 777 (Florida 2003) the Florida Supreme Court awarded damages to a commercial tenant as against the property manager arising out of the lease of commercial space.

This involved the restaurateur purchasing a business that had a lease in place. During the occupancy there were issues that arose in regard to the maintenance and repair of the premises. Notwithstanding the fact that the property manager (in this case Beacon Property Management) had a commercial property management agreement with the owner that actually had expired (prior to the tenant's occupancy) there were nonetheless some discussions between the tenant and the commercial property manager in regard to maintenance and repairs. The Court found in that particular case the tenant could sue the property manager as well as the landlord under FDUTPA and that such act "applies to any private cause of action arising from single, unfair or deceptive act in the conduct of any trade or commerce even if it involves only a single party, single transaction, or single practice (PNR, Inc. v Beacon Property Management 842 So 2d.773 et. 777 Florida 2003).

That holding was upheld on remand from the Florida District Court of Appeals and Beacon Property Management v. PNR 890 So. 2d. 294 4 DCA 2004. The case outlaws any "... unfair method of competition and unfair and deceptive trade practice in the conduct of any trade or commerce."

In Beacon, the property manager asserted that the property manager did not have liability, that the Tenant was not a "consumer" protected by the statute, that the property manager did not engage in any unfair and deceptive trade practices defined by the statute, and further that there was no pattern of conduct as well as the fact that this was an isolated occurrence.

Unfortunately for the property manager, this case ended up being decided against the property manager and establishing that liability in Florida under FDUTPA for property managers.

SIGNIFICANCE OF BEACON CASE AS TO COMMERCIAL PROPERTY MANAGERS

What this means to the property manager is that the property manager now is liable and can be sued under Florida's Unfair and Deceptive Trade Practices Act arising out of actions taken by the property manager in leasing commercial space owned by property manager's client. This is a significant case that imposes statutory tort liability on the commercial property manager (which includes recovery by the prospective Tenant of damages and statutory attorney fees as well as costs.)

The property manager should be acutely aware of this new case and at the very least provide in its commercial property management leasing agreement that there is sufficient and adequate indemnification by the Landlord to save, protect and hold the commercial property manager harmless. This indemnification should be from any and all claims arising under the commercial lease, inclusive of any tort claims, Florida's Unfair and Deceptive Trade Practices Act which could arise as a result of conditions at the premises which may cause damage to the prospective Tenant.

In addition thereto, the property manager should have such indemnification clearly outlined in its property management agreement and should also provide that the commercial property manager's attorney fees are likewise paid for by the Landlord under such circumstances.

ADDITIONAL AREAS OF PROTECTION FOR THE PROPERTY MANAGER:
Florida's real estate commission leasing act

The Florida Legislature has recently provided the property manager a new statute to protect its interest. The new Florida statute is Florida's Real Estate Commission Leasing Act. Florida Statute 475.801 et. seq.

This statute provides the commercial leasing broker with a lien for its leasing commission. It indicates in part that a broker has a lien upon the owner's interest (or Tenant's interest depending upon who the commercial property manager is contracted with), for any real estate commission earned by the broker pursuant to a brokerage agreement with respect to a lease of commercial real estate.

There are some specific provisions contained in Florida Statute 475.801 that provides for the protection of the commercial property manager in the form of a lien, either against the landlord's interest or the tenants respective interest, depending upon the situation and whether the commercial property manager represents the tenant or the Landlord. In order to perfect the lien as Florida Statute 475.805 provides for specific language to be included in a lien notice to be issued by the broker either to the Landlord's or Tenant.

The property manager is encouraged to review this statute and incorporate those provisions in its commercial property leasing commission/listing agreement to further secure and protect the commercial property manager as to outstanding leasing commissions due and owing.

This is equally important for the commercial property manager or real estate broker, acting in a capacity as leasing agent for the owner or leasing agent for the Tenant since the statute does provide for notification and lien rights arising as against the Landlord's interest as well as against the Tenant's interest. A thorough review of the statute and incorporation of these provisions, and a reservation for notification of the rights should be included in any listing or real estate agreement that are entered into by property manager, either that are in capacity as leasing agents for the Landlord, or in a capacity as the agent for the Tenant in securing commercial space.

The commercial leasing lien rights statute is a companion statute to the new commercial real estate commission lien statute as to the sale of commercial properties (see Florida Statute 475.700 et. seq. Lien Act)

The above and foregoing are areas of concern which should be addressed and identified by all commercial property managers engaging in Landlord or Tenant representation in the State of Florida. Failure to do so is a trap for the unwary inasmuch as a commercial property manager's can have exposure for damages as well as attorney fees and costs for conditions of the property outside its control.

Further, unless protections are incorporated into the property manager's contracts or protective measures are incorporated to secure and perfect the payment rights of the property manager, the property manager can be without recourse to recover listing commissions from a Landlord or the Tenant.

Upcoming in next months article is a discussion in regard to actions to be taken by the commercial property manager or owner when a tenant defaults and the protections as afforded to the commercial property manager or landlord in such situations, including distress for rent writs and levy upon tenant's personal property.

As always, please feel free to e-mail me with any questions you may have, or any topics you would like to see addressed in future columns. My e-mail address is Kevin@kfjlaw.com.

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