

JUNE

2008

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COMMERCIAL LEASE NEWSLETTER

**Procedures as to Separating Out the
Eviction Claim vs. Damages Claim in the Lease**

This month I would like to address an issue that is facing all businesses including Commercial Landlords and Commercial Property Managers, which is the procedure as to separating out the eviction claim vs. damages claim in the Lease.

As set forth in our very first Commercial Newsletter (January of 2007), this requires precise drafting of an appropriate Commercial Lease. I have reviewed numerous Commercial Leases in my twenty five plus (25+) years of practicing real estate law and there are a wide variety of Commercial Leases, some better than the others. In fact, I have not seen any that have proper and appropriate remedial provisions relating to alternate dispute resolution proceedings as to damage claims.

The alternate dispute resolution format would allow the Landlord and Tenant to engage in litigation relating to the eviction aspect of the case (possessory rights) on the expedited proceedings allowed for under Florida Statute §83, et. seq. (Non-Residential Tenancy Statute), but would require the parties to engage in the following procedures as it relates to the identification of the amount of damages, if any, as between the parties and award of attorney fees:

1. The parties would specifically waive and relinquish any claims to a Jury Trial;
2. The parties would submit all such non-eviction/possessory claims for damages or other non eviction claim to a three-step process, good faith negotiation, mediation and then binding arbitration.

The Mediation proceedings would be conducted in accordance with Florida Statute §44 and F.R.C.P. 1.720 and be conducted by a State of Florida Circuit Court Certified Mediator with an agreement that the designation for such Mediator which would be to require the Mediator to have a minimum of ten (10) years commercial and real estate litigation experience in order to act

as the Mediator. Likewise, the Arbitration could be conducted and would be conducted by stipulating that the Arbitrator that will handle the Arbitration proceeding would have a minimum of ten (10) years commercial and real estate litigation experience to act as an Arbitrator. This allows the parties to select an experienced Mediator and experienced Arbitrator to resolve their issues.

Mediation in Florida has proven to be one of the most successful programs ever devised by the Florida Bar. The State of Florida and, in many experts' opinions, leads the entire nation in the quality of its Mediation and results, with the results ranging somewhere between an eighty percent (80%) to ninety percent (90%) success rate for Mediation. With these odds and given the fact that the parties are going to be required to submit to non-binding Mediation in any event, even if litigation is elected, would lead one to the distinct conclusion that the alternate dispute resolution proceedings might be incorporated into a Lease for the benefit of the parties. The fact that the case could be undertaken in Circuit Court as far as eviction would also allow for a vehicle and platform to enforce any Mediation or Arbitration settlement agreement or ruling, accordingly.

A Commercial Property Manager is cautioned that before undertaking a drastic modification of a Lease Agreement, that the Commercial Property Manager or Commercial Property Owner retain the services of a quality Real Estate Attorney who has the ability and knowledge to draft an instrument which can be enforceable under such terms and conditions.

Next Month: Discussion in regard to setting pricing for Leases and Options to Renew.