

MAY
2007

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COMMERCIAL LEASE NEWSLETTERS

Part III-Eviction

**I. What is the Procedure and how long does it take to get
an eviction through the court system?**

In the previous two monthly newsletters, I have provided information regarding how to commence and perfect your right to initiate suit and also some ways to secure your interest and the enforcement of your Landlord's lien to collect a prospective judgment. The next step is to identify the time periods and procedures to work the eviction count through the court system. Next month we will discuss suing for damages and suing out the Distress Writ.

A) **Three Day Notice perfected.** At this stage you should have served an appropriate Florida Statute 83.20 Landlord's Notice upon the Defendant/Tenant. You should have provided the necessary time periods with the minimum time period being three (3) business days exclusive of the day of service in accordance with Florida Statute 83.20.

You should have also checked and made sure that you were in compliance with your own provisions contained in the lease, which might require additional notification in excess of the three day notice.

B) **Evidence of Service.** You will also need to identify and establish the fact that you have served the Defendant. Many Landlords make the mistake of mailing the notice to the Tenant with no certified return receipt. Some Landlords mail the certified return receipt to the Tenant, but the certified return receipt never gets delivered.

The approach that I recommend is to have a process server, who serves Complaints, personally serve the Three Day Notice or (Five Day Notice if applicable) upon the Tenant, then provide an Affidavit of Service to the Court. This creates a presumption of service and eliminates delays and the ability to prove actual service.

C) **Initiation of suit.** Once the service has properly been perfected and the time period has run, a suit can be initiated with a multi-count Complaint. Count One of

the Complaint will be the Eviction Count, with Count Two and Three being the Count for Damages and Distress for Rent Writ. This newsletter will focus on Count One, the eviction.

II. Reduction of Time.

Normally a Defendant in every lawsuit has twenty (20) days within which to respond to the Complaint from the date of service. In an eviction action, you can request and impose Summary Procedure pursuant to Florida Statute 51.011. Once invoked, Summary Procedure requires the Defendant to provide a response within five (5) days of the date of service. In order to do this, the attorney should provide that the Summons indicates the five (5) day response time. Also, the attorney should make such request in such count as well as in the prayer for relief under Count One.

A) **Service of the Complaint.** Once the Complaint is served the Defendant has, pursuant to Florida Statute 51.011 and 83.232, responsibility of filing his Answer and Affirmative Defenses within five (5) days of service as to the eviction count. No motion practice is allowed in regard to commercial evictions during the five (5) day response time.

III. If the Defendant fails to file his Answer within five days or the Defendant fails to pay its rent in the Court Registry, the Plaintiff's Counts can do several things.

A. **Default.** In the event of a failure to Answer, the Plaintiff's counsel should promptly file a Motion for Default with the clerk seeking a default as to Count One and then following up with an application to the Court for Possession as to Count One with notification served upon the Defendant at the same location as Defendant was served.

B. **Requirement to post money in the Court Registry.** Pursuant to Florida Statute 83.232 the Defendant/Tenant is required to post in the Court Registry the amount alleged in the Complaint as unpaid rent or suffer an immediate judgment for eviction. Premici v. United Growth Properties, 648 So. 2d 1241 (5DCA 1995). Camena Investments and Property Management Corp. v. Cross, 791 So. 2d 595 (3DCA 2001).

IV. Tender of Rents into Court Registry. "If you want to play, you have to pay".

There are two options in regard to Florida Statute 83.232. The Landlord can be proactive by initiating his own request (filed with the Complaint) for the Court to determine rents. What this enables the Landlord to do is to immediately request the Court to set a hearing on the court docket so that once the five (5) day time period runs and if the Tenant fails to make the payment the Landlord, Plaintiff, can request the Court for a prompt hearing solely to determine the amount of rentals outstanding.

Likewise, the Tenant, can itself further make a request under Florida Statute 83.232 for a hearing. However, the Landlord, in being proactive, can avoid the delays most likely

inherent with Tenant's request since the Tenant will be in no great hurry to deposit monies in the Court Registry.

The 83.232 hearing is solely for the purpose of determining whether (a) outstanding rentals exist and (b) the amount of the rentals that need to be deposited in the Court Registry. The statute is very clear and indicates as follows:

Florida Statute 83.232 Rent paid into registry of court.

“In an action by the Landlord which includes a claim for possession of real property, the Tenant shall pay into the court registry the amount alleged in the complaint as unpaid, or if such amount is contested, such amount as is determined by the court, and any rent accruing during the pendency of the action, when due, unless the Tenant has interposed the defense of payment or satisfaction of the rent in the amount the complaint alleges as unpaid. Unless the Tenant disputes the amount of accrued rent, the Tenant must pay the amount alleged in the complaint into the court registry on or before the date on which his or her answer to the claim for possession is due.”

The Hearing encompasses the following:

“Florida Statute 83.232 (2) If the Tenant contests the amount of money to be placed into the court registry, any hearing regarding such dispute shall be limited to only the factual or legal issues concerning:

(a) Whether the Tenant has been properly credited by the Landlord with any and all rental payments made; and

(b) What properly constitutes rent under the provisions of the lease.”

Accordingly, and at the very least, the Plaintiff/Landlord can take steps to expedite the Tenant either (a) paying rental into the Court Registry or (b) obtaining possession. The worse case scenario for the Plaintiff/Landlord in seeking possession is that the Defendant Answers and shortly thereafter is required to put the money into the Court Registry that is due and outstanding as determined by the Court. This does not satisfy the Landlord's request for possession of the premises, but at the very least, the amounts of rentals are secured in a Court Registry to protect the interest of the Landlord during the pendency of the lawsuit.

V. Defenses of the Tenant

The Tenant may raise certain defenses as to the Three Day Notice and the Depositing of the Rents into the Court Registry.

If the Landlord follows the appropriate procedure to properly identify the outstanding rentals paid and then properly serves the Three Day Notice as well as file the Summary

Procedure Request pursuant to the statute, the Landlord can be satisfied knowing that procedurally his case is properly before the Court with the only determination being how much the Tenant would owe and if the Tenant fails to make such payment the Landlord would be entitled to possession.

VI. Common Defenses Raised Against Landlord.

Certain defenses may be raised against the Landlord, starting with claims by the Defendant/Tenant of non-compliance with Florida Statute 83.20, Notice by the Tenant. The most compelling Tenant defense is the claim that the Landlord has made demand in the Florida Statute 83.20 Notice for more than the outstanding rentals and therefore the Tenant would claim that procedurally the Florida Statute 83.20 Notice is improper, because it has made demand for more than what was outstanding.

Some defendants would point to certain cases that are based upon the residential tenancy statute to indicate that a Florida Statute 83.20 Notice would void-out the ability procedurally to even plead the cause of action, the landlord needs to verify.

The Landlord should be diligent in addressing these particular points and be alerted to make sure that the lease is reviewed, the Three (3) Day Notice demands 'rent' as defined in the lease, and no other charges are included and service is properly perfected. Once this is done, the Landlord or commercial property manager can then look to their counsel to complete the eviction process and make the appropriate legal adjustments.

In summary, if the Landlord proceeds expeditiously, the Landlord may retake possession of the subject premises and have same done within less than thirty (30) days or alternatively, and again, within such thirty (30) day time period, require the Tenant to deposit the outstanding monies due and owing to the Plaintiff/Landlord in the Registry of the Court.

Next month: The process of Distress for Rent.