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**COMMERCIAL LEASE NEWSLETTERS**

**The Effect of Foreclosure on  
Commercial Property Tenants and Landlords**

Given the economic crisis that is facing the residential market, many experts predict that the commercial market will soon begin to see an uptick in foreclosures. In fact, many property owners at this time with income producing properties are seeing attrition in their rentals given the fact that many tenants are abandoning or vacating the premises.

One only has to pick up a newspaper to see the number of retail establishments as well as offices that are closing. By way of example, there have been numerous closures of restaurants in the Estero-Bonita Springs area resulting in a high percentage of vacant space.

Secondly, many commercial and retail property managers and owners have experienced a loss of tenants for both real estate offices, title insurance offices, mortgage brokerage offices and constructions industry support offices including subcontractors offices and alike. This is the impact and negative effect to the commercial and retail market as a result of the collapse of the residential market. Look for things to get worse before they get better any time soon.

The following are some points to consider both for commercial property managers, commercial property owners, as well as commercial tenants:

1. **Failure to Make Mortgage Payments:** In the event a commercial property manager fails to make mortgage payments, the mortgagee/lender most likely would exercise after some legitimate bona fide good faith efforts to resolve the issue. Most commercial lenders will have in their mortgage instruments not only the right to declare the mortgage in default and seek foreclosure of the collateral, to wit: foreclose against the property, but also seek to have their rights under their assignment of rents

document which indicates that if the tenant fails to pay the mortgage payment, then in such event the commercial landlord can require the court to compel the tenant to pay the rental payments. The tenant must pay the rents either into the court registry or collaterally assign those rental payments to the lender pursuant to either an assignment of leases, rents and profit. Most likely, the commercial property owner assigned is contemporaneous with the mortgage loan closing. Alternatively the commercial property manager or owner will be compelled to deposit these in the Court registry pursuant to Florida Statute 697.07 which indicates in pertinent part:

*“...(4) Upon application by the mortgagee or mortgagor, in a foreclosure action, and notwithstanding any asserted defenses or counterclaims of the mortgagor, a court of competent jurisdiction, pending final adjudication of any action, may require the mortgagor to deposit the collected rents into the registry of the court, or in such other depository as the court may designate. However, the court may authorize the use of the collected rents, before deposit into the registry of the court or other depository, to...”*

2. **Appointment of Receiver:** In addition thereto, the commercial property manager must also anticipate that the mortgagee/lender would seek to have a receiver put in place to manage and operate either the center or commercial building. Many lenders take this position in the event that the tenant is unable or unwilling to properly manage the building or alternatively if the tenant is not making mortgage payments and further collecting rents but not applying it towards taxes, insurance, maintenance and other expenses, but rather simply usurping all of the rentals for the benefit of the tenant without regard to the condition or quality of the specific property.

Florida case law clearly indicate that a receiver is not favored since generally courts recognize that a Court is not as qualified to operate a business as the existing owner would be. The appointment of a receiver is not a matter of right, rather it is an extraordinary remedy which must be exercised with caution as it is in designation of the fundamental right of the legal owner to possession of the property. Twinjay Chambers Partnership v. Suarez, 556 So. 2d 781 (2DCA 1990); Alafaya Square Association v. Great Western Bank, 700 So. 2d 38 (5DCA 1997); Anj Future Investments, Inc. v. Ibrahim, 756 So. 2d 153 (3DCA 2000).

However, in certain circumstances, especially in which cases there is economic waste, potential attraction to the building, failure of payment of taxes, maintenance, utilities or alternatively allegations of fraud or misrepresentation in which the borrower clearly has no intent but to garner as much rents as possible without regard to the property, the Court may order a receiver to be put in place to preserve and protect the property as well as to collect the rentals for the benefit of the secured party to wit: the mortgagee.

3. **Stipulated Operating Budget of Real Property:** A good compromise situation between the lender and the owner and commercial property owner, or commercial property manager, is for a stipulation in a foreclosure action in which the

commercial property manager or the commercial owner provide a monthly detailed budget to be filed with the Court and provide it to the mortgagee/lender indicating the outstanding bills and expenses on the property, as well as the rentals received. The commercial property or manager then identifies the application of rentals towards these outstanding payments so that the mortgagee/lender is assured that if rental payments are being received and accepted at least the underlying commercial property expenses are paid for and the property is being maintained, being protected against outstanding tax bills, having insurance in place to preserve and protect the collateral and having expenses for maintenance repairs and other costs aside to preserve and protect the collateral of the lender.

**Next month:** Impact and affect upon commercial tenants: including attornment, subordination and non-disturbance agreements in commercial leases.