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COMMERCIAL LEASE NEWSLETTER

IMPROPER ACTIONS OF LANDLORDS WHICH CAN CREATE EXPOSURE TO DAMAGES, FEES AND COSTS

In today's real estate marketplace, especially in the commercial leasing arena, many commercial landlords are suffering from high vacancy rates, defaults in rents, late payments by tenants and other actions which creates stress and pressure upon these landlords. Sometimes these outside influences cause commercial landlords or property managers to engage in activities which they otherwise would not have considered, such as locking out tenants, improperly interfering with the tenant's activities, eliminating access to utilities, or improperly disposing of tenant's personal property. All of these actions can create significant exposure to commercial landlords and result in damages, fees and costs which might far exceed what the landlord could claim for non-payment of rentals. What follows is an identification of certain identified activities of the landlords, the repercussions of such activities and a huge potential damage exposure for landlords if they engage in imprudent conduct.

Classic Lockout. A lockout is the action of the landlord which is taken based upon the landlord's mistaken belief that, in light of a tenant's breach of the lease, the Landlord has the right to change the locks or preclude the tenant from access to the premises. A derivation of this lockout is one that landlord constructively locks out the tenant by terminating utilities which are being provided by the landlord to the premises, etc.

There is only one narrow circumstance in which a commercial landlord can lock out a tenant without Court Order and that will be discussed later in this article. As a rule, a landlord should not in any way interfere with the use of the premises by the tenant. In further articles we will discuss constructive eviction, quiet enjoyment, but for purposes of this article a lockout would be construed as a specific act of the landlord precluding the tenant from making use of the premises.

Notwithstanding the fact that a tenant may be in material breach of the lease for a non-payment of rent, non-payment of a monetary obligation of the lease, failure to observe rules and regulations or engaging in conduct which is violation of the lease, the landlord is not entitled to change the locks, block the tenant from access or interfere with a tenant's operation of its business at the premises.

Damages From Lockout. Many landlords believe that if a tenant has breached a lease by non-payment of rent they can lock the tenant out and the Landlord's expense, at worst, would be the tenant claiming that they would not have to pay rent for the time period in which the lockout occurred. Landlords working under these assumptions are sadly mistaken. One of the early cases on the unlawful lockout and damages is Harvey B. Ardell, DDS vs Henry B. Milner, 166 So2d 714 (3rd DCA 1964). In this case the Court addressing the elements available to a commercial landlord in the non-residential tenancy statute indicated that

> "as to damages, in the event of unlawful eviction, the lessee is entitled to recover general damages which would be the difference between the market value of the lease and the rent payable under it, and for loss of profits provided these losses can be ascertained with a reasonable degree of certainty."

This theory of damages has evolved in the Ed Rost v Marvin Bowling, 861 So2d 1246 (2nd DCA) the Second District Court of Appeals cited that the holding in Ardell vs Milner for the proposition that a tenant may recover general damages as indicated above, but also citing Young v Cobbs, 83 So2d 417, 419, a Florida Supreme Court case from 1955, and then the Rost Court indicated further that "in addition, a tenant may be able to recover damages 'for losses that are the natural, direct and necessary consequences of the breach when they are capable of being estimated by reliable data, and are such as should reasonably have been contemplated by the parties' citing Moses v Autuono, 56 Fla. 499, 47 So. 925, 927, a Florida Supreme Court case from 1908.

Interestingly enough, the Ardell case was a case involving a dentist and another case involving a dentist WSG West Palm Beach Development, LLC vs. Perrin L. Blank, DDS, 990 So2d 708 (4th DCA 2008) further enlarged and enhanced the damage that could be obtained by a tenant. A close reading of the WSG West Palm Beach Development, LLC vs. Perrin L. Blank, DDS case would indicate a vast array of contract damages both general and special could be obtained by a tenant if they could be established and prove with a reasonable degree of certainty and to have been anticipated by the parties.

A landlord under current Florida law could face damages by a tenant from a lockout which can be significant and can include:

a. Breach of the lease of quiet enjoyment;
b. Breach of the warranty on the lease for possession;
c. Tortuous interference with tenant's business;
d. Loss of prospective profits of tenant's business;
e. Loss of prospective client base;
f. Damages incurred be tenant in being forced to relocate their business;
g. Loss of use of their inventory for a period of time (for example in a situation where there is a restaurant, food store or the like, significant claim can arise in regard to perishable items);
h. Commission lease expenses for reletting expenses incurred by the tenant;
i. Loss of claimed benefit of the leasehold improvements;
j. Increased cost of operations for rent at a new location;
k. Increased advertising costs.

In short, a landlord is sadly mistaken if it believes that the only damages it could sustain by an unlawful lockout would be for the ability of the landlord to claim rents.

Narrowly construed activities of a commercial landlord and taking possession. Only under the specific provisions provided for in Florida Statute 83.05 should the landlord retake possession and that is based upon specific abandonment of the premises by the landlord and in such event only after your actual knowledge of abandonment or alternatively statutory presumption of constructive abandonment based upon some very narrow circumstances. The specific Statute indicates the following:

> **"...(2) The landlord shall recover possession of rented premises only:**
> **(a) In an action for possession under s. 83.20, or other civil action in which the issue of right of possession in determined;**
> **(b) When the tenant has surrendered possession of the rented premises to the landlord; or**
> **(c) When the tenant has abandoned the rented premises.**
>
> **(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."**

As such under a narrow scenario the landlord could technically "lockout" the tenant but it would have to be premised on the fact that the tenant had actually or by statute abandoned the premises. A landlord seeking to pursue an action under this very narrowly construed exception needs to seek legal advice because failure to strictly comply with the Statute could create a significant exposure to damages by the tenant.

The only other potential exception, and again this would be narrowly construed and not to be undertaken without conferring with legal counsel, would be in a situation that a tenant was engaging in unlawful or illegal activities or activities which the landlord would consider to be dangerous. In such event it still would most likely be the better approach to seek the assistance of the Court and an emergency temporary injunction hearing to enjoin the conduct of the tenant rather than for the landlord to undertake actions which could be construed as Common Law Lockout.

With that said, and in next month's column, we will discuss issues which aren't quite as blatant as a lockout, and those include constructive eviction and breach of quiet enjoyment.