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COMMERCIAL LEASE NEWSLETTERS

Part II-Eviction

I: Self-Help or Lockout, is it legal?

The most often-asked question at a commercial or a residential leasing seminar is as follows:

"In the event that the tenant fails to make payment of rent, can I simply change the locks or retake possession if I am certain that this tenant is not going to make payment"? The most dreaded word that a commercial lease attorney representing a commercial property landlord can hear is that his client has taken self-help measures, or performed a lock-out of the tenant.

From experience in handling hundreds of commercial landlord litigation cases, it seems to me that the courts have their hot buttons pushed whenever they hear the words "self-help" or "lock-out." Florida law does not allow a landlord to retake possession of commercial premises by self-help or lock-out. Further, not only would this create an ineffective retaking of possession of the premises, the effects of a self-help or lock-out could be as follows:

A) The tenant could regain possession as a matter of law by court order;

B) The tenant could claim wrongful eviction and business damages based upon such lock-out;

C) The tenant could claim that the landlord converted the tenant's property for the landlord's own benefit;

D) The tenant could claim that the landlord engaged in civil theft by obtaining possession of the property and sue the landlord under Florida Statute 8.12.014, and F.S. 772.11 seeking to recover from the landlord treble damages of any property which was converted, either "temporarily or permanently" by the landlord together with the tenant's attorney's fees.

E) The tenant may recover attorney's fees and costs as a result of such activity.

If the landlord engages in a lock-out or self-help, the landlord may have to jump through a number of hoops to restart the eviction process or have one great explanation to provide the trial Court. This entire process may be tainted with these self-help and lock-out efforts, all of which negate the ability of a commercial lease attorney to effectively pursue the landlord's rights and remedies. As such, in answer to the above question of landlord using self-help or lock-out is as follows: Don't do it and, if you do so, you do so at your own peril.

II: Steps To Be Taken As A Condition Precedent to Eviction- "Avoiding the Tenant Midnight Run"

The above and foregoing identified what a landlord could do in the event of a non-payment or breach of lease and the formal requirements for providing notification. What is the reality, however, of a landlord trying to protect itself in the event the tenant doesn't pay the rent?

We will talk further about what takes place in obtaining the judgment and pursuing the eviction in next month's Newsletter. What the landlord needs to have in place, even before providing notice, is some procedures in the event that the tenant vacates or, in the vernacular of commercial property management, makes the "midnight run" by backing up a moving van and removing all of the tenant's inventory, assets and other items from the premises. In such a case, the landlord is stripped of one of the best weapons a landlord has to encourage payment of the rent or, at least, one of the best weapons the landlord has to secure some type of payment from the tenant, which is the landlord's lien.

Florida Statute 83.08, and case law construing the same, provides the landlord a specific statutorily-created lien upon all of the tenants personal property kept at the leased premises with such landlord's lien commencing at the time the tenant commences a lease at premises. This statutory landlord's lien is superior to all other liens against the tenant's personal property other than a properly recorded security agreement which security agreement has been recorded in the form of a UCC-1 with the Secretary of State and which security interest has been put in place prior to commencement of the lease and the placement of personal property in the leased property.

III: What Is The Benefit of A Landlord's Lien?

This is probably one of the few weapons a landlord really has and counter-balances the fact that the landlord is generally frustrated by not receiving rent, and not

being able to take any affirmative action as against the tenant in the form of self-help and lock-out (as cautioned above).

With the landlord's lien, the landlord has the right to claim against the tenant's property for all rentals then due and owing. The landlord's lien is, in effect, as against the tenant's property wherever it is situated, even if the tenant would happen to vacate. By way of an example, if the landlord is owed $10,000.00 in rent, the tenant vacated without paying the rent and the tenant moved all of the personal property to a storage unit, then as such the landlord would, nonetheless, have its lien as against such tenant's personal property located at the storage unit (or wherever it will be found). The big problem, however, is the pragmatic issue: How can you identify the property and how do you enforce the lien when (a) the lien is not recorded; (b) the personal property is, generally, not titled; and/or, (c) the landlord might not be aware of where the personal property has been taken? The answer to the enforcement rights under the landlord's lien is to discuss the distress for rent writ.

IV: Distress for Rent Writ: The Ability of the Landlord to Take a Proactive and Immediate Enforcement Action Against the Tenant in Lieu of the Self-Help or Lock-Out

The distress for rent writ is the landlord's answer to the inability to utilize the self-help or lock-out. Essentially, Florida Statute 83.11 provides the landlord with the ability to immediately petition the court (without notification to the tenant or the tenant's attorney) and to obtain a distress for rent writ against the tenant's property. This is a constitutionally accepted procedure and is not a violation of the tenant's due process rights because the landlord is required to post a bond for double the amount of the rentals claimed or double the amount of the tenant's personal property and post such monies in the court registry either in the form of a cash bond or a surety bond for the benefit of the tenant in the event that the distress writ isn't properly issued out. The distress writ is then served upon the tenant along with a distress for rent count, which needs to be filed as a condition precedent to obtaining the distress rent. The distress writ (F.S. 83.12) and places the tenant on notice that he cannot remove any of the tenant's property from the premises without further order of the court.

The tenant is afforded the opportunity to recover its property by petitioning the court to determine the value of the property described and by placing a similar type of bond in double the amount of the value of the property or, alternatively, petitioning the court to dissolve the writ if the tenant can show that the writ was improperly obtained. The distress for rent writ is the landlord or commercial property manager's answer to legal "self-help" and gives the landlord or commercial property manager the right to effectively claim all personal property of the tenant as security for the payment of the rent.

In a retail setting, the distress for writ is even more compelling, since the tenant is effectively precluded from engaging in further business since he can't sell or dispose of any of its inventory or assets.

V: Procedures to Have Such Distress Remedies in Place

Obviously, the landlord or commercial property manager needs to be aware of his rights under the landlord's lien and also have the ability to "pull the trigger" on the issuance of the distress for rent writ by having a readily available commercial bond or a bonding agency available to assist the landlord or, alternatively, having the cash available to post with the court registry to secure the enforcement of this landlord's lien.

One of the issues that always arises, and calls attention to the landlord in these matters, is when a tenant is preparing to vacate the premises and remove the personal property. Generally, in such a situation, the landlord will not have very much time to take appropriate action, which generally requires action to be taken within days, if not hours. In such event, a great deal of pre-planning needs to be in place, the bond needs to be available or the cash availability, and the relationship with the commercial attorney needs to be such that the commercial attorney can react quickly, have the law suit prepared and filed with the lawsuit walk through the courthouse and to the judge's chamber for the issuance of the distress writ upon approval of the bond by the clerk and then service by the sheriff of the appropriate county.

All of this takes time and the landlord or commercial property manager should have everything in place to effectively obtain such writ. If the trigger is pulled, there should be at least several days notice which the landlord can give to the commercial attorney to start such activities, since it generally takes the first day for the filing of the law suit and then assignment to the sheriff's department to obtain service no earlier than the following day. This is conditioned upon everything being handled in an appropriate manner. However, in such event, the landlord or commercial property owner will know that if it's successful in obtaining judgment, it arguably would have a valid claim against the tenant's personal property as a means to collect the outstanding rentals.

Next month: Procedure for initiating suit for eviction and damages and the time periods to move such suit through the court system.