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OUR COMMERCIAL REAL ESTATE RECOVERY: LEASE WORKOUTS AND PITFALLS

The commercial real estate economy in Florida is showing signs of recovery. No longer are landlords forced only with a decision to evict a tenant. Now, there are opportunities available to both landlords and tenants to remedy defaults. Given the changing real estate economy, many tenants realize that even though they are in default, they may have the opportunity to revitalize their business and would like to remain in occupancy.

In these situations, the landlords and tenants have the opportunity to resolve pending disputes through a business solution rather than litigation. This can be accomplished by restructuring the lease. However, the landlord and tenant must be aware of their respective rights and the failure to recognize these rights could result in unintended consequences from such workout. Here is a quick primer:

Lease Default:

1. If a lease is in default, the landlord should have identified the defaults existing and specified those in writing.
2. If suit has been initiated, the landlord and tenant can still resolve their dispute by a settlement stipulation which could be approved by the Court.
3. If no suit has been filed and the landlord has made arrangements with the tenant to pay a reduced rent then, again, landlord and tenant should identify these arrangements in writing.
4. If a prospective workout is going to be entered into, the parties should deal with how they treat the past due defaults, fees and expenses and whether those fees are either: a) forgiven, b) reduced or c) recaptured and structured in the lease format.
5. Any such lease restructuring should be in writing, signed by both landlord and tenant with both landlord and tenant's revised lease modifications specified in writing and witnessed by two (2) witnesses who need to subscribe to the executed lease amendment.

Landlord's Lien:

Overarching this entire resolution is the fact that under Florida Law, Florida Statute 83.08, the landlord has a statutory lien against all "...property of the lessee or his or her Sublessee or assigns, usually kept on the premises. This lien shall be superior to any lien acquired subsequent to the bringing of the property on the premises leased."

What this means is that the statutory landlord's lien also need not be filed to be perfected. Rather, the statutory landlord's lien attaches at the commencement of the tenancy or as soon as the tenant's personal property is brought on to the leased premises and is superior to a subsequently created chattel lien. *Beason-Simmons v. Avion Technologies Inc.*, 662 So.2d 1317 (4th DCA 1995).

The landlord must be cognizant of this right in doing a lease workout and could lose that right as described below.

Pitfalls on Lease Workouts:

Oftentimes when a lease is in default and a great deal of details have gone by, landlord and tenant sometimes agree simply to do a brand new lease. The problems that can result with the landlord and tenant simply doing a "clean slate" approach for a new lease are as follows:

1. **Loss of Landlord's Lien** – As indicated above, a new lease only provides the landlord with a first lien priority from the date of the new lease. Any intervening judgments, liens, encumbrances, or claims by third parties against the tenant's property would then elevate third parties, if properly perfected, over the landlord's lien which would then be relegated to the start date of the new lease. The parties must be keenly aware of avoiding this situation.
2. **Guarantors** – Florida Statute 725.01 requires that any guarantee of another person's debt must be in writing to be enforceable. The guarantor of a lease that has been terminated and replaced with a new lease has no liability on a subsequent agreement if that guarantor does not obligate itself to that new lease agreement. Many times, landlords believe that language in a guarantee allowing for continuation of the guarantee for an amendment would allow for continuing guarantee obligations but the landlord needs to be extremely cautious and it would be far better to require that new guarantees be executed to avoid any issue of a claim by guarantor that they have been released.
3. **Extension of Time Periods** – The tenant should recognize that the tenant has a limited time period from the old lease. Notwithstanding the possibility of a brighter future, a new lease might result in the tenant having a longer term lease than the previous obligation. The tenant should be fully aware of all of these rights and negotiate those specific rights, as well as other terms and conditions, for the new lease just as they had done so (hopefully) under the old lease.