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COMMERCIAL LEASE NEWSLETTERS

CURRENT ISSUES IN REGARD TO COMMERCIAL LEASES
IN TODAY'S TROUBLED REAL ESTATE MARKETPLACE

“QUIET ENJOYMENT”

PART III

Inappropriate Actions of Questionable Commercial Landlords: This is Part III on the economic reality of our real estate market place. This is the third of a series addressing issues that have arisen in relation to the economic realities of our troubled real estate market place. The Commercial Mortgage Market has experienced increased losses in defaults on commercial mortgages, increasing from 3.5% to 7% of all commercial mortgages. Many experts are predicting that the commercial real estate market will follow the residential real estate market to a certain degree and over the next year to two years there will be a significant number of commercial mortgages failing and going into mortgage foreclosure. This will have an impact and effect on commercial Tenants based upon the fact that many Landlords are now cutting back on services or potentially failing to provide protection for its Tenants. This letter will address the issue of quiet enjoyment.

Quiet Enjoyment as defined under Florida Law is not use of the premises without noticeable sound decibel intrusion. Quiet Enjoyment means the following:

“...the ordinary lease of realty raises an implied covenant that the lessee shall have the quiet and peaceable possession and enjoyment of the leased premises, so far as regards the lessor, or anyone asserting a title to the leased premises superior and paramount to that of the lessor.”

Hankins v. Smith 138 So. 494 (Fla. 1932)

In instances in which the Landlord fails to pay its mortgage, then in such event the Tenants leasehold interest may be in jeopardy. Many national Tenants have provisions in their lease which provide that such Tenants occupancy will not be interfered with in the

event the mortgagee initiates foreclosure or in the event in any change in ownership or title of the subject property. These clauses in national Tenant Leases and some other sophisticated leases are known as “non-disturbance clauses” and provide protection to a Tenant from a prospective sale, dishonor, or potential foreclosure of a mortgage against the property which could lead to a negative impact upon the Tenant’s occupancy. Clearly, certain commercial Tenants do not want to initiate leasehold improvements, commence operations, and develop good will, only to have such location disturbed with interruption of business as well as potential loss of the good will and location of the premises. As such, and even in the event that the mortgage holder may initiate foreclosure, these Tenants are generally protected from being disturbed on any prospective transfer of title, foreclosure, etc. These provisions rarely are in place in residential leases.

However, there are many Commercial Tenants who simply sign leases which do not have non-disturbance clauses contained therein and whose interest could be foreclosed upon. For example, their lender may wish to dispose of or eliminate a Tenant’s occupancy as a result of the owner of the property failing to make its mortgage payments. It may be in the best interest of the mortgagee to eliminate such Tenant and recapture the property without below market rents, leases or without certain Tenants, located at the premises based upon the mortgages own internal determination of how they wish to use the lease premises. In such cases, the commercial mortgagee (Lender) would initiate foreclosure not only against the owner of the property as mortgagor, but foreclose out the interest of the Tenant to eliminate the use and occupancy by such Tenant at the subject premises. In the event that this occurs and the Tenant does not have a non disturbance clause, the Tenant may be subject to having their leasehold interest divested by a superior mortgage. In such event the Tenant needs to take the following actions as against the Landlord:

1. The Tenant needs to pursue an action against the Landlord for breach of the lease as well as breach of Quiet Enjoyment.
2. The Tenant needs to petition the Court pursuant to F.R.C.P. 1.600 to deposit its rents in the Court Registry.
3. The Tenant needs to claim that any prospective rents paid to the Landlord should be held solely and exclusively to protect the Tenant given the fact that the Tenant’s leasehold interest would be disturbed and the Tenant would be suffering damages as a result of the fact that the Tenant would have business interruption in the event the foreclosure sale takes place.
4. The Tenant should initiate a Cross Claim as against the Lender for damages as a result of a breach of the lease and breach of the covenant and quiet enjoyment specifically.

In these situations the Tenant is advised to seek the assistance of a competent, real estate, litigation attorney who is conversant with these issues to preserve and protect the Tenant’s interest.

Next Month: Constructive Eviction.