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Distress for Rent

The last area in the eviction process for a landlord or commercial property manager should address is the ability of the landlord to secure payment of the rents by having a Distress for Rent put in place as against the tenant's property. An addition to securing rent the placement of the Distress for Rent Writ also may accelerate the ability of the landlord to collect its rents if the tenant decides to remain in occupancy.

I. Landlords Lien.

Under Florida law a landlord is provided with a lien on all personal property of the tenant at the premises specifically, Florida Statute 83.08, gives the landlord a lien upon all of the tenant's personal property either found "upon or off the premises leased or rented" and all other property of the defendant.

The statute also indicates that "the lien of the landlord is superior to any lien acquired subsequent to the bringing of the property on the premises lease."

What essentially this does is provide the landlord with a Statutory Landlord's Lien against the tenant's property. It should be noted that the Landlord's Lien need not to be recorded or filed to be perfected. (Florida Statute 679.1041 (2)).

II. How does a landlord utilize the Landlord's Lien and Distress for Rent Writ?

First of all it must be noted that the landlord's lien is in place at the commencement of the lease and on the tenant's personal properties brought onto the premises. The landlord needs first to determine if any prior recorded UCC1's (security agreements) were properly recorded as against the tenant's property before the lease was commenced and before the property was brought onto the premises. If such be the case then the Landlord's Lien would not be superior to such third parties interest and then of

course the Landlord's Lien would only allow the landlord to incur the expenses of a claim against the tenant's property, but ultimately surrender the rights to the property to the prior secured creditors claim unless there was a substantial and inherent amount of equity available in excess of the third party's secured lien which generally is not the case.

III. Landlord's Lien superior to other liens and enforcement actions.

In the event that the landlord determines that its Landlord Lien is superior to any other liens and its tenant's property the landlord come on prior to initiating this action should investigate the attainment of a Distress for Rent Writ.

The first step in attaining a Distress for Rent Writ is to have the landlord determine either (a) the value of the property or (b) the outstanding amount of the rent. The statute requires the landlord to place into the court registry either cash or an approved surety bond double the amount of rent or double the amount of the personal property.

On most occasions the landlord is unable to determine the value of the tenant's property and therefore simply places into the court registry either a cash bond or a surety bond in double the amount of the rent that is claimed as being due and owing at the time of the initiation of the suit.

IV. Procedure for obtaining Distress Writ.

Based upon the statute (Florida Statute 83.11) the Complaint filed by the landlord (generally consisting of Count 1 for Eviction, Count 2 for Damages and the third Count for Distress for Rent) needs to reflect the amount of claim and to be in compliance with statutory provisions for a Distress for Rent Writ. The Distress for Rent Writ also needs to be verified under oath by a representative of the landlord indicating the outstanding amount of rents that are in fact due as of the filing of the complaint and to verify the allegations contained in the statutory requirements for a Distress for Rent Writ.

V. What is the effect and impact of a Distress for Rent Writ?

Once the procedural requirements are met for the filing of the law suit and that the verification and the attainment of the bond then the Complaint is filed with the court and the bond is then approved by the clerk. Once approved by the clerk the Complaint should be hand delivered by the counsel to the court with a request that the court, ex parte, (without a hearing or a notice to the tenant defendant) issue the Distress for Rent Writ. Once the Distress for Rent Writ is issued then the Sheriff serves the Complaint and the Distress for Rent Writ upon the defendant. The impact of the Distress for Rent Writ is that the tenant is ordered by the court to refrain from disposing, moving or in any way secreting any of its personal property except on the premises.

This means that all of their equipment is subject to being sold by the Sheriff once the landlord sues-out its lawsuit and obtains judgment for the rent, effectively indicating

that all of the tenant's assets used in this business (assuming same or not held by a secured creditor at a lien superior to the landlord) would act to compensate the landlord for any rent that could not be collected. For a retail tenant this means that the retail tenant can not sale any of its inventory and if the tenant continues to remain in business and sale or dispose of its inventory that is an immediate event of default of the court's Distress for Rent Writ and an attorney can take further appropriate action which could be converting the Distress for Rent Writ to an Attachment Writ claiming the tenant is in default of the Distress for Rent Writ and claiming the tenant is attempting to divest the landlord of its properly filed lien. In such case the bond would be transferred from the Distress for Rent Writ bond and attached upon the Sheriff would revisit the premises and lock down the premises to preclude the tenant from disposing of any further of its property, effectively ending the tenant's business as a retail establishment.

VI. What are the practical effects of the Distress for Rent Writ?

One of the practical effects of the Distress for Rent Writ is that the tenant is simply unable to conduct business or knows that any of its business assets have been seized and are under the control of the courts order. The practical effect is that many tenants will, if possible, pay the outstanding rents rather than fight the landlord at that time or ultimately recognized the futility of their position. The tenant of course has the opportunity to challenge the Distress for Rent Writ under the procedures enumerated under the Florida Statute 83 and can also place its own bond for release of the personal property.

VII. Summary

The proper use of the Distress for Rent Writ can greatly enhance the landlords ability to (a) collect rent (b) secure future payments of rent (c) provide an absolute message to the tenant that failure to pay rent is not only taken seriously, but will have a dramatic and immediate negative impact upon the tenant and tenant's business and property.

Next month we will start discussing specific lease clauses starting with a common area of maintenance provisions.