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COMMERCIAL LEASE NEWSLETTERS

PART I.

**EVICCTIONS: WHAT IS A LANDLORD OR PROPERTY MANAGER TO DO
WHEN A TENANT FAILS TO PAY RENT OR DEFAULTS ON ITS LEASE?**

Part I: Non-Payment Scenario

At some point in time, the commercial landlord, or the commercial property manager, will face the following scenarios:

- A) The tenant has stopped paying its monthly rental and is deficient in its rent; and/or,
- B) The tenant has engaged in activities which constitute a breach of the lease, and has not cured this breach, even though the tenant has been warned appropriately; and/or,
- C) The tenant appears to be depleting its inventory (especially in a retail setting), and the owner, landlord or property manager suspects that the tenant is preparing to make a “midnight run”; and/or,
- D) The lease has terminated and the tenant has held over without a written lease extension; and/or,
- E) The tenant has actually vacated the premises owing rent and removing all of its personal property.

In any of these scenarios, the commercial landlord or commercial property manager is faced with the decision as to how to proceed. The answer is that before the situation occurs the commercial property manager should have already put in place a procedure for dealing with each and every instance as set forth above.

Part II: Underlying Basis For Eviction – A Comprehensive Lease Agreement

As in previous articles, the fundamental concept of any successful commercial lease endeavor is that a lease be put in place that contains the essential and necessary terms to protect the interest of the commercial landlord as well as the tenant. Specifically, as it relates to the eviction, this lease agreement should expressly identify the events of default which would enable the landlord to undertake various remedies under Florida law. The fundamental concepts of Florida law are that the landlord, in the event of non-payment of rent, can take the following actions:

- A) The landlord can sit back and do nothing and sue the tenant each month as the rents become due;
- B) The landlord can initiate suit for eviction to take possession of the subject premises for the benefit of the tenant;
- C) The landlord can initiate suit to take possession of the premises for the benefit of the landlord; Wagner v. Rice 97 So. 2d 267, 270 (Fla. 1957)

Part III: Actions to Be Taken to Regain Possession In the Event of a Tenant Default

Florida Statute 83.05 provides how the landlord may recover possession of non-residential property. The essential decision a landlord, or property manager, must make with a commercial tenant is whether he/she wants to obtain the rentals and get back on track or if the landlord/property manager, wants to evict the tenant. If the former, the landlord or the commercial property manager, should issue notification to the tenant, and make demand upon the tenant for the rent in an appropriate letter requesting a payment. .

If the latter, Florida Statute 83.20 provides several scenarios the landlord, or commercial property manager, can regain possession provided that certain notices are given. These scenarios are:

- A) Where the person holds over after expiration of the lease;
- B) Where the person fails to pay rent and thereafter received a three-day notice in writing demanding the rent or possession; or,
- C) Where the tenant materially breaches the lease and is afforded a fifteen-day written notice requiring a cure of its breach and the cure does not take place.

The question then facing the landlord, or commercial property manager, is whether the tenant should be evicted or whether the rentals need to be paid. Generally, landlords, and commercial property manager, simply want the lease to be cured and rather than send a formal statutory demand notice for the possession of the premises, the landlord, or commercial property manager, will simply issue a notification of non-

payment of rent to encourage the tenant to make such payment. This would be considered a “soft touch” letter.

Alternatively, the landlord, or commercial property manager, may consider a sterner letter, which would be a demand under Florida Statute 83.20, which not only sets forth a specific demand for the rent but also provides the tenant with a statutorily required three-day notice under Florida Statute 83.20 to pay such rent or surrender the premises.

Part IV: Right to Waive Notice Under F.S. 83.20

Notice under Florida Statute 83.20 may be waived or may be extended by the commercial lease language. Most landlords, and commercial property managers, would be surprised to know that the residential tenancy statute, which generally deals with rental of an apartment or house, is much more detailed and specific and covers a greater area of the law than the non-residential tenancy statute, which involves the lease of commercial space. This is because the law generally indicates that commercial leases should be construed based upon the negotiations of the parties, whereas the residential tenancy situation generally requires more statutory interpretation to protect the rights of residential tenants who are given more statutory protection than the non-residential tenant.

There is nothing provided in Florida Statute 83, Chapter I which indicates that the lease agreement cannot afford the tenant additional notification time for payment of the rental or curing of the breach of the lease. Further, there is a specific case arising out of the Second District Court of Appeals, 2004, A.Z.3, Inc. d/b/a BCBG Max Azria v. Tampa Westshore Associates Limited Partnership, which provides the landlord the right to immediately undertake a lawsuit to evict the tenant for non-payment of rent, even though the landlord didn't comply with Florida Statute 83.20 and gave no notice, three day or otherwise.

However, there are several impediments to a landlord in exercising such rights based on a waiver provision in the lease. First of all, if the landlord intends to waive the statutory notice under Florida Statute 83.20, the landlord and tenant should know that such waiver of a statutory notice must be expressly stated in the lease agreement. In the AZ3 case, the language found by the court was in fact express as to the waiver. However, the court found that other provisions in that same paragraph had been stricken, thereby negating the expression of the waiver. All in all, it appears that Florida courts are reluctant to waive the three-day notice.

From a practical standpoint, why would a landlord not want to have a three-day notice in the lease? It seems that the general approach has always been, in a non-payment situation, that the landlord first sends a “soft touch” letter to gain the attention of the tenant before issuing and serving upon the tenant a three-day notice demanding possession or payment. The landlord, if diligent, can utilize a F.S. 83.20 notice to request payment and cure of the lease. Normally, all of this should take place in the very first month when a tenant defaults. The only advantage of the waiver of the 83.20 notice is the fact that the landlord can save three (3) business days (not including the day of

service) from whence he can initiate suit. The time period of the three day notice excludes Saturdays, Sundays and legal holidays.

Part V: Service of Three-Day Notice

It would seem appropriate then, for a diligent landlord simply to use either the “soft touch” or the 83.20 notice and track the time period. It is up to the landlord, or commercial property manager, to decide whether to initiate suit in the event that the tenant fails to respond to the 83.20 notice.

Next Month: “Lock-out” and “Self-Help” The Most Often Asked Questions of a Landlord is “Can I Lock Out the Tenant?”