

## Lease Enforcement and Remedies: Structuring Key Provisions for Eviction, Self-Help, Injunction, Action for Damages

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# LEASE ENFORCEMENT AND REMEDIES

Structuring Key Provisions for  
Eviction, Self Help, Injunction, and  
Action for Damages

# *Tenant Default*

*So you think your tenant  
is in default?*

**What do you do first?**

**READ THE LEASE!**

# *Documenting Tenant Defaults*

## Tenant Default Letters:

- To whom do you send it?
- How do you send it?
- How long do they have to cure?
- Do you get attorney's fees?



# *Monetary vs. Non-monetary Defaults*

- Monetary Defaults
  - Rent
  - Additional Rent
- Non-monetary Defaults
  - Use: Can you enjoin a tenant from conducting a prohibited use?
  - Hours
  - Parking
  - Abandonment/Going Dark
  - Insurance
  - Unauthorized Assignments
  - Failure to Maintain Premises
  - Holding Over
  - Liens

# *How long do I have to wait for the Tenant to fix a problem?*

- Grace and Cure Periods
- Extensions of Cure Periods

What do I do while I am waiting for them to cure the default?

# *Workouts and Payment Plans*

## **Good news! They want to send me some money:**

- Agreement to Pay Defaulted Rent and Promissory Notes
- Lease Amendment
- Clean up Lease
- Remove Exclusives
- Add Guarantor
- Get an Estoppel
- Increase Tenant's Security Deposit

# *Default Remedies*

**They never cured! Now what?**

- To terminate the lease or not to terminate the lease, **that** is the question.
- Can I regain possession?
- What if the tenant is uncooperative?

# ***Damages – Show me the money!***

- **Unpaid rent**
- **Future rent (Acceleration)**
- **Costs to re-let**
- **Attorney's fees**
- **Late fees and interest**

***HOW DO YOU EVICT THEM?***

**MOVED**

**DON'T TAKE ANY MONEY!**

If you take money, you may  
have to **start all over!!**

## *Demand for Possession*

**IF YOU DON'T PAY...**

**YOU DON'T STAY!!!**





## *The Legal Way*

- GEORGIA: Because of your failure to pay rent when due, please vacate the premises immediately.
- FLORIDA: Three (3) day notice to Quit. Demand is hereby made that you pay the total amount of **\$LOTS OF MONEY\$** or that you surrender possession of the premises to the above referenced landlord within three (3) days from service of this notice to you. Personal Service Needed.
- TEXAS: Self Help– Landlord can lock tenant out!
- ILLINOIS: No Self Help; give 5-day notice.

# Self-Help Remedies for Landlords



Practice Point: Self-help remedy depends on state law



- States where common law self-help remedy not abrogated by statute
- States where self-help remedy limited to abandonment or other limited circumstances
- States where self-help is prohibited and Landlords only resort to courts
- States where there are no statute or cases that prohibit use of self-help

# States Where Self-Help Remedy is Prohibited



At least 19 states +  
District of Columbia

Illinois: “[T]he Forcible Entry and Detainer Act put an end to the practice of self-help and provides the sole means for settling a dispute over possession rights to real property. The statute prohibits any actual or constructive self-help through force, including changing locks or locking someone out of his land.”

(*Fortech LLC v. R.W. Dunteman Co.*, 852 N.E.2d 451, 459 (Ill.App. 1<sup>st</sup> Dist. 2006))

# *States Where Self-Help Remedy is Available*

Practice Point: Consider whether Landlord  
Should Exercise Remedy

- *First*, Court can be hostile to self-help before a tenant can defend
- *Second*, Court may not allow unless explicitly reserved in lease
- *Third*, Landlords who wrongfully evict may be liable for damages or must restore possession to tenant

# *Whom Do You Sue ?*

- The Tenant
- The Guarantors
- Assignors



# *For What Can You Sue?*

- Rent
- Interest
- Late Charges
- Attorney's Fees
- Any other claim that has matured
- Unamortized TI
- Damage to the premises

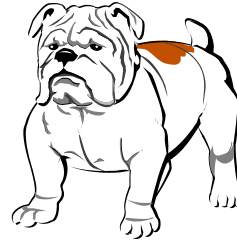


Is Injunctive Relief Possible For Either Landlord Or Tenant?

# Service

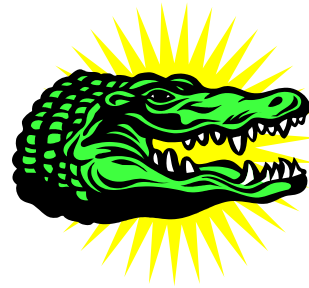
- Georgia

- Personal
- Tack and Mail
- Served by Sheriff, Marshal, or Process Server



- Florida

- Personal
- Tack and Mail
- Served by Sheriff or Process Server



- Illinois

- Personal
- Served by Sheriff, Marshal or Process server



# *Time to Answer After Service*

- Georgia
  - 7 days
- Florida
  - 5 days if no money sought
  - 20 days if money sought
- Illinois
  - No requirement to Answer. Raise defenses at Hearing date.





# *Trial*

- Non Jury
- Jury Trial



- Most states require tenant to pay rent if they want a Jury Trial or a continuance is requested by the tenant.

# *Default Judgment*

- **Georgia**
  - No Need for Hearing in Front of Judge
- **Florida**
  - Apply for Entry of Default
  - Request Default Judgment
  - No Need for Hearing
- **Illinois**
  - Usually File Verified Complaint
  - File Motion for Entry of Default and Prove-up



# *Eviction*

- Georgia
  - Request entry of Writ of Possession
  - Eviction usually occurs within three to four weeks
- Florida
  - Writ of Possession issued by Judge
  - Sheriff supervises Eviction
- Illinois
  - Writ of Possession Issued by Judge
  - Sheriff then evicts tenant



# *Who Needs To Attend The Eviction?*

- Client
- The attorney for a difficult tenant
- Sheriff
- Locksmith
- Labor
- Department of Revenue

(if demon Rum is present)

# *What is Evicted?*

- Personal Property
- Food and Drink
- Signs
- Trade Fixtures
  - Nailed, Screwed or Glued

# *When the Eviction is Happening*





# *When the Eviction is Complete*



# *Lawsuits*



# *VENUE*

- Principal place of business
- Residence of individual
- County where Registered Agent is located
- Where the lease provides

# *Corporate Service*

Obligation to attempt service on corporation through Registered Agent or Corporate Officer.

# *Personal Service*

- Georgia

You must serve the person, the spouse or someone residing with them of a suitable age.

- Florida

You must serve the person, or any person residing with them over the age of 15.

- Illinois

You must serve the person or someone residing with them over the age of 13

# *Default Judgment*

- Can only get damages that are in complaint
- Might require a hearing for non-rent claims such as damage to premises
- Might have to prove actual attorney's fees at hearing

# *If Defendant Answers, then you can conduct Discovery*

- Interrogatories
- Request to Produce Documents
- Request for Admissions
- Depositions
- Six months to a year to complete  
(Some state, i.e. Illinois, can be more expedited)

# *Motions for Summary Judgment*

- Motions are really mini-trials
- Requires a Client's affidavit
- Defendant generally has 30 days to respond
- A hearing may be required
- Judges may take a long time to rule
- Better off in eviction cases to just go to trial?

# ***Trials***

- Non-Jury Trial
- Jury Trials
- (Many States Enforce Waiver of Jury Trial)

# *Appeals*

- Appellant Brief
- Appellee Brief
- Reply Brief
- Oral Argument - Can be waived.
- Final Ruling Can Take a Long Time



# *Alternative Dispute Resolution*

- Arbitration
- Mediation

***So Your Tenant Filed Bankruptcy.  
What Do You Do ?***



## *When the Tenant Files Bankruptcy*

- Automatic stay applies
- You *cannot* sue them
- You *cannot* evict them
- You *cannot* levy on their property
- You *cannot* even demand rent from them directly

# *What Are the Debtor's Obligations?*

- Pay Post-Petition Rent promptly after petition date including the portion of the month after they have filed Bankruptcy.
- Keep insurance in place.
- Maintain the premises.

# *What Can You Do?*

- Motion to Compel Payment of Administrative Rent.
- Motion must be served on Debtor {your tenant}, attorney and trustee.
- Make them pay rent as and when it becomes due.
- Hearing required to be held.
- Place the Defendant in default through their lawyer only.

# *Motions to Lift Automatic Stay*

- If they don't pay, they don't stay.
- Most are resolved by consent orders requiring payment and the right to evict without hearing if they default.

# *Motions To Assume The Lease, Reject The Lease or Extend The Time*

- Tenant must make a decision within 120 days of petition date whether they will assume or reject the Lease.
- Debtor only gets one 90 day extension if Landlord objects, **however**, an amendment to Section 365(d)(3) of the Bankruptcy Code enacted into law on December 27, 2020 allows additional time for a Chapter 11 debtor to assume or reject leases, adding an additional 90 days to the existing 210 day deadline. (This is **only** in affect for **two years**.)

# *Motions To Assume The Lease, Reject The Lease or Extend The Time*

- An Amendment to Section 365(d)(4) also enacted into law on December 27, 2020 affords small business debtors (under the new SBRA provisions of the Bankruptcy Code, commercial debtors having noncontingent, liquidated debts under \$7.5M) the opportunity to defer rent coming due in the first 120 days of their bankruptcy case and repay the deferred rent over time through their bankruptcy plan. (This is **only** in affect for **two years**.)
- An Amendment to Bankruptcy Code Section 547 enacted on December 27, 2020 creates a temporary exemption from bankruptcy preference laws. (This is **only** in affect for **two years**.)



## *What Do They Have To Do To Assume Your Lease ?*

- Cure all pre-petition defaults. This does not always mean pay it all now but make a payment to cure the defaults.
- Maintain the use clause as provided for in the Lease.
- Provide adequate assurance of future performance which means that the party to whom they are assigning Lease has to be in the same financial status as the tenant was when the lease was signed.

# *What Happens If They Reject Your Lease?*

- The Tenant usually vacates the premises and you get an unsecured claim which means you are almost last to get paid.
- Claim Includes:
  - All pre-petition rent unpaid.
  - Rejection Damages {Twelve months rent or 15% of three years rent, whichever is greater}.
- An Administrative Claim for rent for the time they occupy the premises after the filing of Bankruptcy until they give you possession or you obtain it by lifting the stay.