

Pay Up or Get Out: The Landlord’s Guide to the Perfect Eviction

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The recent downturn in the economy has spurred many businesses that thrived for years, such as Linens ’N Things,² to fail, leaving landlords with no choice but to evict tenants and seek damages for rent under the terms of the lease. South Florida’s seasonal climate only exacerbates these conditions.

As an attorney who frequently evicts defaulting commercial tenants, I see lawyers all too often take unnecessary steps that increase costs, delay eviction, and fail to secure fixtures and property that may benefit their client. The purpose of this article is to provide practical steps and analysis for landlords to efficiently evict a defaulting tenant, while at the same time maximizing their potential to recover rent owed under the lease. First, this article will discuss the requirement of sending a three-day notice. Next, it will discuss the steps a landlord should consider if there is valuable equipment on the property, which a landlord may wish to secure in order to attract a future tenant. Finally, the article will highlight several issues to consider when filing an eviction and damages complaint.

I. THE LANDLORD’S OPTIONS UPON DEFAULT

In Florida a landlord typically has three options when faced with a tenant who defaults on rent payments and vacates the rented premises before the end of the lease term: (1) the landlord may treat the lease as

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2. See *In re* Linens Holding Co., No. 08-10832(CSS), 2009 WL 2163235 (Bankr. D. Del. June 12, 2009).

terminated and retake possession exclusively for his own purposes; (2) the landlord may retake possession for the account of the tenant, holding the latter responsible in general damages, measured by the difference between the stipulated rent and any amount the lessor is able to recover in good faith from his reletting; or (3) the landlord may do nothing at all and sue the tenant as each rent installment matures, or for the full amount of the rental due when the term ultimately ends.³

The first option typically results in the landlord being unable to sue for damages measured by the rent payments, which accrue in the future after the landlord has retaken possession.⁴ The rationale for this result is that the lease has been “surrendered” by either the actions of the parties or their expressed intent.⁵ In *Colonial Promenade v. Juhas*, the Fifth District Court of Appeal held that the nature of the landlord’s use of the premises, after a defaulting tenant abandons them, governs the availability of the landlord’s remedy: “If, in fact, the lessor resumes possession of the premises and utilizes them for purposes other than recovery of the rental due him under the contract, then—and only then—is he foreclosed from suit for the balance because such would inequitably constitute a double remedy.”⁶

“If the second option is selected, the leasehold estate remains in existence, to the extent that the landlord can hold the tenant for damages for the balance of the lease term following the landlord’s recovery of possession.”⁷ However, the landlord then has a duty to mitigate the tenant’s damages by making a good faith effort to re-lease the property at a fair rental.⁸ The landlord must also credit the tenant for any rents obtained from another tenant during the lease term.⁹ The third option is rarely chosen.¹⁰

However, where a written lease exists, the provisions of the lease are conclusive and typically govern the rights of the parties.¹¹ Because

3. See *Wagner v. Rice*, 97 So. 2d 267, 270 (Fla. 1957).

4. See *Geiger Mut. Agency v. Wright*, 233 So. 2d 444, 447 (Fla. Dist. Ct. App. 1970); *Deringer v. Pappas*, 164 So. 2d 569, 571 (Fla. Dist. Ct. App. 1964).

5. 34 FLA. JUR. 2D *Landlord and Tenant* §§ 107, 110 (2011); *Babsdon Co. v. Thrifty Parking Co.*, 149 So. 2d 566, 569 (Fla. Dist. Ct. App. 1963); *Kanter v. Safran*, 68 So. 2d 553, 556–58 (Fla. 1953).

6. 541 So. 2d 1313, 1315 (Fla. Dist. Ct. App. 1989) (citing *Hulley v. Cape Kennedy Leasing Corp.*, 376 So. 2d 884, 885 (Fla. Dist. Ct. App. 1979)).

7. *Hudson Pest Control, Inc. v. Westford Asset Mgmt., Inc.*, 622 So. 2d 546, 549 (Fla. Dist. Ct. App. 1993).

8. *Id.*

9. See *Coast Fed. Sav. & Loan Ass’n v. DeLoach*, 362 So. 2d 982, 984 (Fla. Dist. Ct. App. 1978); *Jimmy Hall’s Morningside, Inc. v. Blackburn & Peck Enters.*, 235 So. 2d 344, 346 (Fla. Dist. Ct. App. 1970).

10. See *Hudson Pest Control*, 622 So. 2d at 549.

11. *Rodeway Inns of Am. v. Alpaugh*, 390 So. 2d 370, 372 (Fla. Dist. Ct. App. 1980).

the lease's provisions are conclusively controlling, a court will not substitute its judgment for that of the parties by rewriting that lease.¹² Business leases, however, are subject to a different analysis:

Although the Florida Residential Landlord & Tenant Act . . . permits courts to override the terms and conditions of residential leases if they are deemed inequitable, there is no such control over business leases. As to those, the rule governing contracts in general is applicable—a party will not be relieved of obligations deliberately undertaken merely because they prove burdensome or otherwise improvident.¹³

II. THE THREE-DAY NOTICE

While many landlords may choose to work with tenants after default, they must proceed cautiously to make certain that their course of conduct does not orally modify the terms of the lease. Despite language in the lease typically providing that “this lease cannot be altered by oral modification,” the law is clear in Florida that a written contract may be modified by oral agreement if the parties have accepted and acted upon the oral agreement in a manner that would work a fraud on either party to refuse to enforce it even if the written contract provides that no modification is permissible unless in a writing.¹⁴ Accordingly, a landlord could inadvertently establish a new course of dealing modifying the lease or payment terms.

To avoid potential claims of oral modifications or course of dealing modifications, the landlord should send the tenant and its guarantors a default notice pursuant to Section 83.20.¹⁵ Whether the default is for failure to adhere to a monetary term under the lease (typically a tenant's failure to pay the rent, Common Area Maintenance (“CAM”), or security deposit), or a non-monetary term, such as a tenant's failure to maintain insurance, the three-day notice needs to specifically detail the tenant's defaults and provide the tenant with at least three days' notice.¹⁶ Frequently, the tenant has negotiated a period in excess of three days to cure the default so landlords should review the lease prior to providing notice.

12. *S. H. Kress & Co. v. Desser & Garfield, Inc.*, 193 So. 2d 192, 195 (Fla. Dist. Ct. App. 1966).

13. *Rodeway Inns*, 390 So. 2d at 372 (citing *Nussey v. Caufield*, 146 So. 2d 779, 783 (Fla. Dist. Ct. App. 1962)).

14. *See Prof'l Ins. Corp. v. Cahill*, 90 So. 2d 916, 918 (Fla. 1956); *Arvilla Motel, Inc. v. Shriver*, 889 So. 2d 887, 891 (Fla. Dist. Ct. App. 2004); *King Partitions & Drywall, Inc. v. Donner Enters.*, 464 So. 2d 715, 716 (Fla. Dist. Ct. App. 1985).

15. FLA. STAT. § 83.20 (2012).

16. *Id.*

A proper three-day notice should include the following:

- (1) monetary or non-monetary basis for the default;
- (2) the amount of rent owed;
- (3) location (in the county where the tenant is located) where the rent should be paid;
- (4) notice to all parties required to be noticed under the lease (and all guarantors even if not required);
- (5) dates of default;
- (6) time period to cure; and
- (7) more restrictive or less restrictive requirements as set forth in the lease negotiated between the parties.

Notably, rent can include more than just the base rent owed under the lease. Many leases typically include CAM as an element of rent under the lease. Accordingly, a tenant can be liable for their failure to pay more than just the base rent.

While it is important for a landlord to make certain that the default notice sets forth the relevant grounds for default and the amount of rent owed, improper notice of default is not a valid defense sufficient to defeat the requirement that rent be paid into the court's registry.¹⁷

In *McDonnell v. Williams*, a residential eviction, the tenant claimed that the three-day notice should have allowed for an additional five days for compliance and demanded the incorrect amount of rent.¹⁸ The court held that neither of the alleged defects was sufficient to justify a dismissal of the complaint.¹⁹ The failure to deposit the undisputed rent operates as a waiver of the tenant's right to raise defective notice as a defense to the eviction.²⁰

Pursuant to Section 83.202:

The landlord's acceptance of the full amount of rent past due, with knowledge of the tenant's breach of the lease by nonpayment, shall be considered a waiver of the landlord's right to proceed with an eviction claim for nonpayment of that rent. Acceptance of the rent includes conduct by the landlord concerning any tender of the rent by the tenant which is inconsistent with reasonably prompt return of the payment to the tenant.²¹

From a practical standpoint, because landlords typically have rent depos-

17. See *Stanley v. Quest Int'l Inv., Inc.*, 50 So. 3d 672, 673 (Fla. Dist. Ct. App. 2010).

18. 14 Fla. L. Weekly Supp. 979b, 980 (Fla. Palm Beach County Ct. 2007).

19. *Id.* Notably, the court stated: "If the tenants wished to defend the eviction on the basis of an alleged defect in the three day notice, the tenants were nonetheless obligated to deposit undisputed rent into the Court Registry."; see also *Kaiser v. Dudley*, 14 Fla. L. Weekly Supp. 489a, 489 (Fla. Broward County Ct. 2007); *Jandebour v. Capobianco*, 13 Fla. L. Weekly Supp. 388a, 388 (Fla. Broward County Ct. 2006) (holding that the failure to deposit the undisputed rent operates as a waiver of the tenant's right to raise a defective notice in defense of the eviction).

20. *Cantor v. Wilson*, 10 Fla. L. Weekly Supp. 1024b, 1030 (Fla. Sarasota County Ct. 2003).

21. See FLA. STAT. § 83.202 (2012).

ited into lock boxes or use a separate management company for maintenance and management of the property, they need to put all employees on notice not to accept rent payments if they seek to complete their eviction.

The simplest method to serve a three-day notice is to have a process server serve the three-day notice and return an affidavit of service of the notice. Then, the landlord or attorney can attach a copy of the three-day notice along with the return of service as exhibits to the complaint, and avoid service issues.

III. THE DISTRESS WRIT (§ 83.12)

A distress writ, prohibiting the tenant from removing any equipment or goods from the premises, can be an extremely valuable tool. Once the landlord has made the decision to evict,²² but before it initiates an action for eviction or damages, the landlord needs to consider whether there is any equipment on the premises that may be valuable or useful for attracting a new tenant. Many times landlords spend thousands of dollars in tenant improvement allowance to provide a means for tenants to purchase equipment.

By way of example, a grocery store may spend significant tenant improvement allowances for purchasing refrigeration units, shelving, security systems, and other equipment. Were the landlord to simply file an eviction action without a court order specifically requiring the tenant to leave all equipment in the premises, the tenant might go dark and try to move out in the middle of the night with the equipment. While there is a landlord's lien pursuant to Section 83.08, which provides for civil and criminal penalties when a tenant intentionally removes property from the premises,²³ from a practical standpoint, a court order stating that the tenant cannot remove the property from the premises is a much more powerful tool.²⁴ Were the tenant or its employees to violate a court order, they could be held in contempt of court.

Pursuant to Section 83.12:

A distress writ shall be issued by a judge of the court which has jurisdiction of the amount claimed. The writ shall enjoin the defendant from damaging, disposing of, secreting, or removing any property liable to distress from the rented real property after the time of service of the writ until the sheriff levies on the property, the writ is vacated, or the court otherwise orders. A violation of the command of the writ may be punished as a contempt of court. If the defendant

22. Summary procedure is governed by Section 51.011.

23. See FLA. STAT. §§ 83.08(2), 817.562, 818.03 (2012).

24. See FLA. STAT. § 83.08.

does not move for dissolution of the writ as provided in s. 83.135, the sheriff shall, pursuant to a further order of the court, levy on the property liable to distress forthwith after the time for answering the complaint has expired. Before the writ issues, the plaintiff or the plaintiff's agent or attorney shall file a bond with surety to be approved by the clerk payable to defendant in at least double the sum demanded or, if property, in double the value of the property sought to be levied on, conditioned to pay all costs and damages which defendant sustains in consequence of plaintiff's improperly suing out the distress.²⁵

Specifically, Section 83.12 and the relevant case law provide for a distress writ only when the following conditions are met: (1) the writ shall not issue without judicial authorization; (2) the writ may issue only upon the allegation of specific facts; (3) *the party seeking to invoke a writ is required to post a bond to guarantee the tenant's interests*; (4) the tenant has the opportunity to obtain an immediate hearing to dissolve a writ; and (5) there is the opportunity for a prompt hearing on the merits, though not necessarily a pre-deprivation hearing.²⁶

An *ex-parte* verified complaint for a distress writ should be filed in the circuit court (provided the value of the equipment exceeds \$15,000), and the landlord must post a bond for either twice the amount owed or double the amount of the estimated value of the property in order to obtain the writ.²⁷

Notably, Section 83.08 provides the landlord with a lien on the equipment for rent owed. It states:

Every person to whom rent may be due, the person's heirs, executors, administrators or assigns, shall have a lien for such rent upon the property found upon or off the premises leased or rented, and in the possession of any person, as follows

(1) Upon agricultural products raised on the land leased or rented for

25. See FLA. STAT. § 83.12 (2012).

26. See *Phillips v. Guin & Hunt, Inc.*, 344 So. 2d 568, 571 (Fla. 1977).

27. See FLA. STAT. § 83.08; *Goodman v. Brasserie La Capannina, Inc.*, 602 So. 2d 1245, 1247-48 (Fla. 1992) (before issuing a distress writ, the court must determine whether the verified complaint meets the statutory requirements and whether it alleges a *prima facie* case that the tenant may damage or dispose of property or remove property); see generally FLA. STAT. § 83.18 (2012):

Distress for rent; trial; verdict; judgment.—If the verdict or the finding of the court is for plaintiff, judgment shall be rendered against defendant for the amount or value of the rental or advances, including interest and costs, and against the surety on defendant's bond as provided for in s. 83.14, if the property has been restored to defendant, and execution shall issue. If the verdict or the finding of the court is for defendant, the action shall be dismissed and defendant shall have judgment and execution against plaintiff for costs.

the current year. This lien shall be superior to all other liens, though of older date.

(2) Upon all other 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.

(3) Upon all other property of the defendant. This lien shall date from the levy of the distress warrant hereinafter provided.²⁸

“A landlord’s statutory lien, which is not required to be filed or recorded in order to be perfected, attaches at commencement of the tenancy or as soon as property is brought onto premises.”²⁹ Moreover, a landlord’s statutory lien for rent upon all other property of a tenant usually kept on premises is not superior to a lien acquired by another prior to the property being brought upon the leased premises, or prior to the commencement of the tenancy under lease.³⁰ Notably, a liquor license is not attachable under a Landlord’s lien. In *Walling Enterprises, Inc. v. Mathias*, the Florida Supreme Court held that a liquor license was general intangible property rather than property of a tenant usually kept on leased premises and therefore was not subject to a landlord’s statutory lien for rent.³¹

IV. THE EVICTION COMPLAINT

Once the decision to obtain a distress writ has been made and a prior three-day notice has been served, the landlord can then proceed with its actions for eviction and for damages. While the landlord can choose to file one complaint for both eviction and damages, from a practical standpoint, the landlord should almost always file the eviction complaint separate from its damages complaint and should elect to file the eviction action in county court.³² The summary procedure in Section

28. *Id.*

29. *Robie v. Port Douglas (Florida), Inc.*, 662 So. 2d 1389, 1391 (Fla. Dist. Ct. App. 1995); *see also Hennessey Capital SE v. David (In re Miller Eng’g, Inc.)*, 398 B.R. 473, 485 (Bankr. S.D. Fla. 2008) (under Florida law, a landlord may explicitly waive his right to a landlord’s lien, for rent due and owing, with respect to property placed on leased premises; however, without the landlord specifically agreeing to subordinate his lien to that of chattel mortgage, the landlord continues to possess priority of lien); *Lynch Austin Realty, Inc. v. Engler*, 647 So. 2d 988, 989 (Fla. Dist. Ct. App. 1994) (landlord’s statutory lien for rent upon all other property of lessee usually kept on premises “attaches either at the time of commencement of a tenancy or when a chattel is brought on the premises, whichever is later, and is superior to a subsequently created chattel lien.”) (quoting *United States v. S.K.A. Assoc., Inc.*, 600 F.2d 513, 515 (5th Cir. 1979)).

30. *Lynch Austin Realty*, 647 So. 2d at 989.

31. 636 So. 2d 1294 (Fla. 1994); *see also* FLA. STAT. § 83.09 (2012) (“No property of any tenant or lessee shall be exempt from distress and sale for rent, except beds, bedclothes and wearing apparel.”); *Flanigan’s Enters., Inc., v. Barnett Bank of Naples*, 639 So. 2d 617, 618–19 (Fla. 1994) (holding that tenant’s liquor license was not “property”).

32. *See Ward v. Estate of Ward*, 1 So. 3d 238, 239 (Fla. Dist. Ct. App. 2008); *Hollywood*

51.011 provides an efficient means for eviction of a tenant. Because county courts frequently handle eviction actions, some county courts will *sua sponte* issue orders requiring the tenant to pay rent into the court registry by a date certain. If the court does not issue an order requiring a date certain by which rent must be paid into the court's registry, the landlord should file a motion requiring the tenant to pay rent into the court's registry. If the tenant fails to make timely payment a default will be entered—allowing for the landlord to move for a final judgment of possession.

The elements for a cause of action for eviction are:

- (1) the parties had an agreement requiring the Tenant to pay the Landlord rent for the use of the property;
- (2) the Tenant defaulted in the payment of this rent;
- (3) three days' notice requiring the payment of the rent or the possession of the property was served on the Tenant; and
- (4) the Tenant failed to pay the rent or deliver possession of the property within three days.³³

The summons issued in an eviction action by the county court requires the tenant to respond to the complaint within five business days.³⁴ Were the landlord to file the damages and eviction action in the circuit court, two separate summonses would need to be issued—one for five days and one for thirty days. If the landlord seeks to expedite an eviction, because circuit courts may not be as familiar with eviction actions as are county courts, filing in county court is typically the more expedient path. The complaint must be filed in the county where the premises are located.³⁵

V. SERVICE OF THE EVICTION COMPLAINT (§ 83.22)

Service of an eviction complaint is governed by Section 83.22.³⁶ Make certain that your process server is familiar with Section 83.22, which differs from the normal service of process. The statute provides:

- (1) After at least two attempts to obtain service as provided by law, if the defendant cannot be found in the county in which the action is pending and either the defendant has no usual place of abode in the county or there is no person 15 years of age or older residing at the defendant's usual place of abode in the county, the sheriff shall serve

Food Court, Inc. v. Hollowell, 588 So. 2d 243, 243 (Fla. Dist. Ct. App. 1991); Palm Corp. v. 183rd St. Theatre Corp., 344 So. 2d 252, 252 (Fla. Dist. Ct. App. 1977).

33. Boudreau v. M & H Food Corp., 895 So. 2d 501, 503 (Fla. Dist. Ct. App. 2005).

34. See FLA. STAT. § 51.011 (2012).

35. See Griveas v. Amoco Oil Co., 854 So. 2d 841, 843 (Fla. Dist. Ct. App. 2003); Sheehan v. Marshall, 453 So. 2d 481, 481 (Fla. Dist. Ct. App. 1984).

36. See FLA. STAT. § 83.22 (2012).

the summons by attaching it to some part of the premises involved in the proceeding. The minimum time delay between the two attempts to obtain service shall be 6 hours.

(2) If a landlord causes, or anticipates causing, a defendant to be served with a summons and complaint solely by attaching them to some conspicuous part of the premises involved in the proceeding, the landlord shall provide the clerk of the court with two additional copies of the complaint and two prestamped envelopes addressed to the defendant. One envelope shall be addressed to such address or location as has been designated by the tenant for receipt of notice in a written lease or other agreement or, if none has been designated, to the residence of the tenant, if known. The second envelope shall be addressed to the last known business address of the tenant. The clerk of the court shall immediately mail the copies of the summons and complaint by first-class mail, note the fact of mailing in the docket, and file a certificate in the court file of the fact and date of mailing. Service shall be effective on the date of posting or mailing, whichever occurs later; and at least 5 days from the date of service must have elapsed before a judgment for final removal of the defendant may be entered.³⁷

A process server might prove to be the more sensible method of obtaining service as opposed to using a sheriff.³⁸ As a matter of practice, it is prudent to adhere to Section 83.22(2) and *always* provide the clerk of the court with additional copies of the eviction complaint and envelopes.³⁹ Service is one of the few defenses that can potentially derail a landlord in his quest to evict a tenant.

VI. DEFENSES TO AN EVICTION ACTION (§ 83.232)

Once an eviction action is filed, aside from service, there are only two recognized defenses to depositing the full amount of funds demanded by the landlord into the court's registry: (1) the amount of

37. *Id.*

38. *See Knight Manor No. One, Inc. v. Freeman*, 254 So. 2d 375, 375–76 (Fla. Dist. Ct. App. 1971) (holding that actions of deputy sheriff in knocking on door of premises at 9:00 a.m. and leaving after receiving no response and in returning at 12:30 p.m. the same day, at which time deputy, receiving no response, posted copy of complaint and summons on door, were insufficient to establish that defendant could not be found in the county in which action was pending for purpose of permitting service by attaching summons to some part of the premises).

39. *See* FLA. STAT. § 83.22. This Section provides a special statutory provision for service of process in possession actions (no such remedy exists for damages action). It states that the property may be posted if, after two attempts at service at least six hours apart, the defendant cannot be found at the premises or in the county in which the action for possession is pending. *Id.* If the defendant is an individual, service by posting is lawful where the defendant has no usual place of abode or there is not a person of fifteen years of age or older residing at his usual place of abode in the county. *See id.*

rent owed is in dispute; 2) the rent has been paid in full; or both.⁴⁰ Pursuant to Section 83.232 once the eviction action is filed the tenant must:

(1) [P]ay into the court registry the amount alleged in the complaint as unpaid, or if such amount is contested, such amount as is determined by the court, and any rent accruing during the pendency of the action, when due, unless the tenant has interposed the defense of payment or satisfaction of the rent in the amount the complaint alleges as unpaid. Unless the tenant disputes the amount of accrued rent, the tenant must pay the amount alleged in the complaint into the court registry on or before the date on which his or her answer to the claim for possession is due. If the tenant contests the amount of accrued rent, the tenant must pay the amount determined by the court into the court registry on the day that the court makes its determination. The court may, however, extend these time periods to allow for later payment, upon good cause shown. Even though the defense of payment or satisfaction has been asserted, the court, in its discretion, may order the tenant to pay into the court registry the rent that accrues during the pendency of the action, the time of accrual being as set forth in the lease. If the landlord is in actual danger of loss of the premises or other hardship resulting from the loss of rental income from the premises, the landlord may apply to the court for disbursement of all or part of the funds so held in the court registry.

(2) If the tenant contests the amount of money to be placed into the court registry, any hearing regarding such dispute shall be limited to only the factual or legal issues concerning:

(a) Whether the tenant has been properly credited by the landlord with any and all rental payments made; and

(b) What properly constitutes rent under the provisions of the lease.

(3) The court, on its own motion, shall notify the tenant of the requirement that rent be paid into the court registry by order, which shall be issued immediately upon filing of the tenant's initial pleading, motion, or other paper.

(4) The filing of a counterclaim for money damages does not relieve the tenant from depositing rent due into the registry of the court.

(5) Failure of the tenant to pay the rent into the court registry pursuant to court order shall be deemed an absolute waiver of the tenant's defenses. In such case, the landlord is entitled to an immediate default for possession without further notice or hearing thereon.⁴¹

Accordingly, the only recognized defenses to a tenant being required to pay funds into the court's registry are that the rent has been paid in full, or that the amount of rent is contested, and even then, the tenant must

40. See *Dream Closet, Inc. v. Palm Beach Mall, LLC*, 991 So. 2d 910, 911 (Fla. Dist. Ct. App. 2008).

41. FLA. STAT. § 83.232 (2012).

deposit the amount of the rent it believes to be due into the court's registry. If the tenant contests the amount of rent, an evidentiary hearing is held on the limited issue of (a) whether the tenant has been credited properly for rent paid and (b) what constitutes rent under the lease.⁴²

While many tenants may claim that they received a defective three-day default notice, they can only raise this defense only *after* rent has been paid into the court's registry.⁴³ From a practical standpoint, the Florida Statutes allow for very little wiggle room for a defaulting tenant if it fails to make payment of rent into the court's registry. Accordingly, rent must be paid into the court's registry regardless of whether or not the default notice was defective.⁴⁴

VII. DAMAGES

After completing the eviction, the landlord will typically seek to recover for breach of the lease against both the tenant and the lease's guarantors. In many instances, it may be time consuming and cost prohibitive to collect a monetary judgment against a small corporation. Therefore, the landlord's best chance to recover rent owed may be to file a lawsuit against the individual guarantors.

The damages complaint is typically nothing more than a simple action for breach of a lease and breach of a guaranty, which this article will not discuss. There are, however, two notable complications that landlords may encounter when trying to recover on a guaranty: (1) if the lease has been assigned, the guarantor may try to claim that it is no longer liable under the lease; or (2) the guarantor may claim that the guaranty terminated on assignment.

VIII. ASSIGNMENT OF A LEASE

"The liability of an original [tenant] for rent accruing after the original [tenant] makes an assignment of the lease is principally dependent on whether he or she expressly covenanted in the original lease to pay rent; if such [tenant] did, then his or her liability continues."⁴⁵ In fact, despite an assignee assuming the obligations of a contract, "the assignor

42. FLA. STAT. § 83.232(2)(a)-(b) (2012).

43. See *Stanley v. Quest Int'l Inv., Inc.*, 50 So. 3d 672, 673 (Fla. Dist. Ct. App. 2010).

44. Even if a tenant notifies the landlord under Section 83.201 that the landlord is in default of the lease, and even though a notice under this Section may constitute a valid defense to dispute the amount of rent owed, it is not a valid basis to defeat the requirement that the amount of undisputed rent must be deposited into the court's registry. See FLA. STAT. § 83.201 (2012). Many leases specifically provide that notice under Section 83.201 does not entitle the tenant to claim a setoff against an eviction action.

45. 34 FLA. JUR. 2D *Landlord and Tenant* § 151 (2011); see also *Kornblum v. Henry E. Mangels Co.*, 167 So. 2d 16, 18-19 (Fla. Dist. Ct. App. 1964).

remains secondarily liable as a surety or guarantor” under the original agreement.⁴⁶ “The assignor remains liable to the obligor for the assignee’s defective performance, just as he or she would be liable for his or her own defective performance.”⁴⁷ Unless the landlord expressly releases the original tenant, the original tenant typically remains liable for any breaches of the lease.

IX. THE CONTINUING GUARANTY

On occasion, a landlord may allow a tenant to assign his or her lease to a new tenant or to a sublessee. Typically, when making this accommodation for the tenant, the landlord will require the original tenant’s guarantors to remain liable under the lease. If the assignee subsequently amends the lease, extending it for additional years beyond the terms of the original lease, the original guarantor can still remain liable as long as the guaranty is continuing in its nature.⁴⁸

A guaranty may be a “restricted guaranty,” meaning it is “limited to a single transaction or a limited number of [specific] transactions.”⁴⁹ A restricted guaranty is not effective as to transactions other than the ones guaranteed.⁵⁰ A guaranty may also be a “continuing guaranty.” A guaranty is continuing “if it contemplates a future course of dealing during an indefinite period, or if it is intended to cover a series of transactions or succession of credits.”⁵¹

“A continuing guaranty covers all transactions, including future ones, that are within contemplation of the agreement.”⁵² A continuing guaranty can be general or special in nature.⁵³ It can also be absolute or

46. 6 AM. JUR. 2D *Assignments* § 129 (2010).

47. *Id.*

48. In *Sheth v. C.C. Altamonte Joint Venture*, the Court held that “[u]nder Florida law, a guaranty for a lease can be continuing, but it must expressly state that it is intended to cover future transactions for the guarantor to be liable for extensions and renewals.” 976 So. 2d 85, 87 (Fla. Dist. Ct. App. 2008). Therefore, the argument must be advanced that the language of the guaranty, defining it as “continuing,” obligated the guaranty on any future extensions or renewals by the tenant. *Id.* In *Sheth*, the court introduced an exception to the general rule of continuing guarantees whereby a guarantor would be removed from continuing obligations depending on several factors, including: (1) “the obligee’s lack of knowledge of a change in the obligor’s business”; (2) “the nature of the change of the obligor business”; (3) “whether the guarantor participated in the change in the obligor business” (an estoppel argument); and (4) “whether the guarantor sought to revoke the guaranty.” *Id.* at 88–89. Where a guaranty does not express by its terms that it is of a continuing nature, it does not continue into a successive term. *Id.* at 87. The question of whether a guaranty is a continuing one is a question of how the guaranty is worded. *Id.*

49. 38 AM. JUR. 2D *Guaranty* § 17 (2010).

50. *Id.*

51. *Fid. Nat’l Bank of S. Miami v. Melo*, 366 So. 2d 1218, 1221 (Fla. Dist. Ct. App. 1979).

52. *Brann v. Flagship Bank of Pinellas, N.A.*, 450 So. 2d 237, 239 (Fla. Dist. Ct. App. 1984).

53. 38 AM. JUR. 2D *Guaranty* § 14 (2010).

conditional.⁵⁴ In *Causeway Lumber Co. v. King*, a husband and wife signed a continuing guaranty.⁵⁵ Later, the couple divorced and, subsequently, the husband incurred an additional \$15,000 in charges, which he could not pay.⁵⁶ When the husband filed for bankruptcy, the appellate court opined that the wife was responsible.⁵⁷ The court noted that “a continuing guaranty covers all transactions, including those arising in the future, which are within the description of [sic] contemplation of the agreement.”⁵⁸ “[W]ith an absolute and unconditional guarant[y], the creditor is not required to notify the guarantor of any dishonor.”⁵⁹ Thus, a continuing guaranty “covers all transactions, including those arising in the future, which are contemplated by the agreement.”⁶⁰

Accordingly, simply because a guarantor is not aware that his assignee has extended the terms of the original lease, if the guaranty explicitly provides that it survives assignment and amendment, it can be considered a continuing guaranty and potentially allow the original guarantor to be liable for subsequent extensions by the assignee, providing the landlord with additional parties from whom it may recover for rent owed.

X. CLOSING COMMENTS

While there is never a guaranteed method for a landlord to protect its interests, by serving a proper three-day default notice, considering the filing of a distress writ, filing an eviction action in county court, and ultimately filing a damages complaint, the landlord can decrease the time period required to obtain possession and maximize its ability to recover damages for the tenant’s breach of the lease.

54. 38 AM. JUR. 2D *Guaranty* § 15 (2010).

55. *See* 502 So. 2d 80, 81 (Fla. Dist. Ct. App. 1987).

56. *Id.*

57. *Id.* at 81–82.

58. *Id.* at 81 (quoting *Fid. Nat’l Bank of S. Miami v. Melo*, 366 So. 2d 1218, 1221 (Fla. Dist. Ct. App. 1979)); *see also* *Institutional & Supermarket Equip., Inc. v. C & S Refrigeration, Inc.*, 609 So. 2d 66, 67 (Fla. Dist. Ct. App. 1992); *Brann v. Flagship Bank of Pinellas, N.A.*, 450 So. 2d 237, 239 (Fla. Dist. Ct. App. 1984).

59. *C & S Refrigeration*, 609 So. 2d at 68 (citation omitted) (internal quotation marks omitted).

60. *Id.* at 67 (citation omitted) (internal quotation marks omitted).

