UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

2018 Bernard O. Dow Leasing Institute
November 9, 2018
Houston, Texas

Commercial Landlord's Remedies for Tenant's Breach

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I. INTRODUCTION[1]

Possession, the old saying goes, is nine-tenths of the law. But this old saying is only partly true when it comes to a landlord's remedies for a tenant's default under a commercial lease. Determining who is entitled to immediate possession of the leased premises is only one among many legal issues that must be resolved when a tenant defaults; even so, the resolution of this one issue often decisively affects the others. Repossessing the premises—whether done rightly or wrongly—may affect a landlord's claim for rent and its separate and distinct claim for damages. Doing so wrongfully, however, breeds unwanted offspring—the twins, defense and counterclaim—whose births complicate, and increase the cost of, recovering possession, rent, and damages.

A. SCOPE OF OUTLINE. This outline is intended to be a practical guide to the exercise of, and interplay between, a landlord's possessory and monetary remedies. Sections II-V cover a landlord's possessory remedies—judicial evictions, lock-outs, and dealing with personal property in the premises. Section VI.A covers a landlord's monetary remedies—recovering rent and damages—and points out the difference between the two. And Section VI.B reviews the first two decades of mitigation jurisprudence in Texas and the application of mitigation to leases in other jurisdictions. Section VII covers a number of defenses and counterclaims commonly asserted by a tenant in response to a landlord's attempts to recover possession, rent, and damages.

B. DECIDING TO EVICT. A landlord should make the decision to pursue eviction only after carefully considering its business objectives, its legal options, and the risks and costs associated with the pursuit of each. Before beginning the lease enforcement process, a landlord should examine its dealings with its tenant to uncover, if possible, any areas of potential liability exposure. A landlord or its attorney ordinarily should review thoroughly the correspondence with the tenant; the lease; any lease amendments; guaranties; UCC filings; subleases and assignments; landlord's loan documents; subordination, attornment, and non-disturbance agreements; and tenant estoppels. Usage controls common in retail leases (*e.g.*, co-tenancy clauses, exclusive use clauses, *etc.*) may make it necessary to examine other tenants' leases to determine the effect of terminating one tenant's lease on the rights and remedies of other tenants in the shopping center.[2] Failure to conduct such a review is a source of many common missteps in the lease enforcement process, including perhaps the most common—failing to send proper notices to all of the parties entitled to receive them.[3]

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[1] Unless otherwise specified, the text of all cited Texas statutes and codes through the end of the 2017 legislative session are taken from Vernon's Texas Rules Annotated (West 2017).

[2] Robert Harms Bliss, *The Exclusive Use Clause: The Agent Provocateur of Retail Leasing*, SOUTHERN METHODIST UNIVERSITY SCHOOL OF LAW—REAL ESTATE LAW: LEASES-IN-DEPTH (1999); William E. Blodgett, *Retail Lease Provisions*, STATE BAR OF TEXAS: 17TH ANNUAL ADVANCED REAL ESTATE LAW COURSE (1995); Timothy R. Brown, *Commercial Leases: Drafting and Modification – Shopping Center, Retail and Similar Leases*, UNIVERSITY OF HOUSTON LAW CENTER CONTINUING LEGAL EDUCATION: REAL ESTATE WORKOUTS, DOCUMENTS & CLOSINGS (2005); Bernard O. Dow, *Exclusive Use Clauses: Drafting and Enforcement Issues,* SOUTHERN METHODIST UNIVERSITY SCHOOL OF LAW—REAL ESTATE LAW: LEASES-IN-DEPTH (1994); M. Rosie Rees and Theani C. Louskos, *Retail Leasing: Special Concerns & Sample Co-Tenancy Provision from Major Tenant Form,* NEGOTIATING COMMERCIAL LEASES 993-1068 (Practicing Law Institute 2003); Thomas M. Whelan, *Selected Retail Leasing Issues—Usage Controls*, STATE BAR OF TEXAS: 16th ANNUAL ADVANCED REAL ESTATE DRAFTING COURSE (2005).

[3] *See, e.g., Gill Sav. Ass'n v. Chair King, Inc.*, 783 S.W.2d 674, 676 (Tex. App.—Houston [14th Dist.] 1989) (noting that the landlord failed to send notice of tenant's default to tenant's creditor as required by agreement subordinating landlord's lien to creditor's lien on tenant's inventory), *aff'd in part and modified in part per curiam*, 797 S.W.2d 31 (Tex. 1990), *on remand sub nom., Resolution Trust Corp. v. Chair King, Inc.*, 827 S.W.2d 546 (Tex. App.—Houston [14th Dist.] 1992, no writ).

An appropriate review of these materials and a probing interview of the property manager should put a landlord in a far better position to choose the remedy, or combination of remedies, which will most effectively accomplish its legitimate business objectives.

C. NEGOTIATING WITH DELINQUENT TENANTS. Negotiation can be the least costly and most effective way for a landlord to resolve a dispute with a delinquent tenant. But missteps in negotiations with a delinquent tenant can seriously impair a landlord's remedies. One landlord, for example, negotiated a repayment plan with its tenant and, in the process, partially released the guarantor of the lease by accepting a note from the tenant for the past due rent.[4] Another landlord's conduct during negotiations about the tenant's non-payment of rent contributed to a large judgment against the landlord for wrongful eviction and fraud.[5]

D. ANATOMY OF A LEASE ENFORCEMENT CATASTROPHE. *Gill Sav. Ass'n v. Chair King, Inc*. illustrates some pitfalls of an ill-considered and poorly executed eviction after failed settlement discussions.

The tenant claimed its landlord failed to repair defects in the premises, treated this failure as a breach of the lease, and notified the landlord it would withhold payment of rent. The landlord balked. The tenant then offered to place the rent into an escrow account, and the landlord agreed to the escrow arrangement. But for some unexplained reason, the escrow account was never established.[6]

Meanwhile, temptation in the form of Toys "R" Us, a nationally known and creditworthy tenant, came calling. To the landlord's chagrin, the troublesome, delinquent tenant occupied the only space in the shopping center suitable to Toys "R" Us. The landlord asked the president of its troublesome tenant to relocate to comparable space in the same shopping center so that the landlord could enter into a lease with Toys "R" Us. While negotiations for comparable space were ongoing, the tenant received a letter demanding payment of the delinquent rent. The tenant's president claimed a representative of the landlord told him not to worry about the demand letter. The tenant's president then rejected an offer from the landlord for substitute space, and the tenant's president left town for a week, believing negotiations with the landlord for substitute space would continue after he returned. In his absence, the landlord hired a moving company and evicted the tenant. The landlord, of course, claimed the tenant should have known it would be evicted because the landlord had told the tenant's president, before he left town, that "other alternatives would have to be considered" if the tenant rejected the landlord's offer.[7]

In a *nonjury* trial, the trial court found the landlord liable for $144,309 in actual damages, $355,277 in punitive damages,[8] and $54,862 in attorneys' fees.[9] The trial court also ruled that the landlord's conduct during these negotiations estopped the landlord from asserting any right to recover rent.[10] The San Antonio Court of Appeals and the Texas Supreme Court both affirmed the trial court's liability findings, although the damage awards were ultimately remanded for a new trial.[11] In

[4] *Glasscock v. Console Drive Joint Venture*, 675 S.W.2d 590, 592 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

[5] *Gill Sav. Ass'n*, 783 S.W.2d at 674-80.

[6] *Id*. at 676.

[7] *Id*.

[8] *Id*.

[9] *Id*. at 680.

[10] *Id*. at 679.

[11] *Id*. at 680 (affirming trial court's judgment on liability, modifying award of attorneys' fees, and remanding for new trial on damages), *aff'd in part and modified in part per curiam*, 797 S.W.2d at 32-33 (affirming judgment on liability,

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