



Institute of Real Estate Management

# Eviction Process and Important Lease Provisions

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# Tennessee Detainer Statute

- T.C.A. § 29-18-101 et seq.
- T.C.A. § 29-18-104 – Unlawful Detainer
  - Unlawful detainer is where the defendant enters by contract, either as tenant or as assignee of a tenant, or as personal representative of a tenant, or as subtenant, or by collusion with a tenant, and, in either case, willfully and without force, holds over the possession from the landlord, or the assignee of the remainder or reversion.

## Jurisdiction

- T.C.A. § 29-18-107 and T.C.A. § 29-18-108
  - Provide that General Sessions and circuit court have concurrent jurisdiction.
    - General Sessions is, theoretically, quicker and cheaper.

# General Sessions Process

- File Warrant.
- Serve Warrant.
- Set hearing, no less than 6 days after service of Warrant. T.C.A. § 29-18-117.
- Hearing/Trial
  - In most courts (and absolutely in Davidson County) there is at least one continuance as a matter of right.
    - Continuance should not be for more than 15 days. T.C.A. § 29-18-118.
      - Seldom enforced.

# General Session Process

- The judgment of a the General Sessions may be appealed to Circuit within 10 days of the entry of the order.
- To appeal an adverse decision on possession, the Tenant must post a bond equal to one year's rent.
  - T.C.A. § 29-18-130.
  - Tenant cannot appeal possession and not put up the bond equal to one year's rent.
- To appeal an adverse decision on damages, the Tenant may give up possession and simply post the appeal bond (which is \$234.50).

## General Sessions Process

- If the matter is appealed and the appropriate bonds are put in place, the matter then proceeds to Circuit Court.
- Resolution of a Circuit Action can take 3 months and up.

# Self-Help Not Allowed in Tennessee

- T.C.A. § 29-18-102. Forcible entry and detainer; exceptions
- (a) A forcible entry and detainer is where a person, by force or with weapons, or by breaking open the doors, windows, or other parts of the house, whether any person be in it or not, or by any kind of violence whatsoever, enters upon land, tenement, or possession, in the occupation of another, and detains and holds the same; or by threatening to kill, maim, or beat the party in possession; or by such words, circumstances, or actions, as have a natural tendency to excite fear or apprehension of danger; or by putting out of doors or carrying away the goods of the party in possession; or by entering peaceably and then turning or keeping the party out of possession by force or threat or other circumstances of terror.
- (b) No action for forcible entry and detainer shall lie against any tenant who has paid all rent due for current occupancy of the premises and who is not in violation of any law nor otherwise in breach of the tenant's written lease, but this subsection shall not apply in any manner to farm property, nor shall the provisions of this subsection be construed to alter or amend any valid lease agreement in effect on May 31, 1979.

## Self-Help is a Tort

- 94<sup>th</sup> Aero Squadron of Memphis, Inc. v. Memphis-Shelby County Airport Authority, 169 S.W.3d 627 (Tenn. Ct. App. 2004)
  - “Although other states allow a commercial tenant to waive its statutory protection from self-help repossession through a right-of-reentry clause, in Tennessee, “the action of unlawful detainer is the legal substitute for personal entry.”
  - “The cases construing Tennessee FED law hold that, absent abandonment or surrender of the premises by the tenant, the landlord is required to seek a writ of possession before reentering the land.”
  - Holding in 94<sup>th</sup> Aero Squadron interesting because in a case in which a tenant is in default for failure to pay rent, this case limited the damages assessed to Landlord to nominal damages.

# Important Provisions:

- Notice/Cure Provisions
- Holdover Provisions
- Tenant's Right of Offset
- Non-Waiver
- Attorney Fees

# Notice/Cure Provisions

- In preparing for possible litigation.
  - Make sure you read the lease.
  - Comply with all notice provisions.
    - If it says written notice, that is what it means.
    - If the lease provides that notice must be hand-delivered, that is what it means.
  - Comply with all cure provisions.
    - Allow tenant the opportunity to cure if the lease requires it.
    - Even if the lease does not allow for the tenant to cure, I typically still provide the tenant a reasonable time period to cure.

# Holdover Provisions

- A typical holdover provision provides that a tenant who has not surrendered possession of the premises at or after the expiration of the term of the lease must pay a multiple of the previously agreed upon rent. These provisions are enforced for a multitude of reasons. Before discussing the strategic implications of a holdover provision, the first question that must be addressed is whether holdover provisions are enforceable under Tennessee law.

# Enforceability of Holdover Provisions

- Generally, Tennessee law disfavors penalties and damages provisions that are unreasonable will not be enforced, regardless of an agreement by the parties.
  - *Beasley v. Horrell*, 864 S.W.2d 45, 48 (Tenn. Ct. App.1993); see also *Harmon v. Eggers*, 699 S.W.2d 159, 163 (Tenn. Ct. App.1985).
- However, the Tennessee Court of Appeals has held that a double rent holdover provision does not constitute an unenforceable penalty.
  - See *Brooks v. Networks of Chattanooga, Inc.*, 946 S.W.2d 321 (Tenn. Ct. App. 1996).

# Holdover Provisions

- *Brooks v. Networks of Chattanooga, Inc.*
  - In *Brooks*, the Court of Appeals reaffirmed that “[w]here a tenant receives reasonable notice of a change in rental, his continuance in possession beyond the rent period renders him liable for the new rent notwithstanding any protest he may make.”
  - The Court of Appeals went on to hold that it would be axiomatic to allow a landlord to increase the rent upon reasonable notice, based upon the holding in *Russells Factory Stores, Inc. v. Fielden Furniture Co.*, 232 S.W.2d 592 (1950), and to not allow an increase expressly contracted for in a written contract.
  - For those reasons, the *Brooks* court found that the double rent holdover provision was enforceable and was not an unenforceable penalty.

# Holdover Provisions

- It should be noted that in the absence of a well-drafted holdover provision, if a tenant refuses to surrender possession, the tenant will be liable for the fair market rental value.
- Specifically, the Tennessee Supreme Court has stated:
  - In summary, the rule as enunciated in *Brinkley* and *Russells* continues to be the law in Tennessee in situations where the landlord gives a reasonable notice of the rent increase in the form of a definite demand. Where there is no agreement between the parties, the tenant becomes liable for the fair market rental value for the period that it occupies the premises beyond the term of the lease.

# Strategy re Holdover Provisions

- Holdover provisions can benefit a landlord in a multitude of ways.
  - First, and the most obvious, is that if a tenant holds over, a well-drafted holdover provision provides the basis to recover a multiple of the rent. Absent any such provision, the tenant would only be liable for the fair market rental value.

# Strategy re Holdover Provisions

- Second, the multiplier can create obvious leverage when a landlord is seeking to extricate a tenant from the premises. Obviously, if a tenant has an impending increase of rent to the tune of two times its immediately previous rental rate, the tenant is financially motivated to surrender the premises. It should be noted that any holdover provision should provide that it applies in the cases including the expiration of the term or earlier termination of the lease pursuant to landlord's right to terminate, whether that be upon an event of default by the tenant or earlier termination provision.

# Strategy re Holdover Provisions

- Third, when the term of a lease expires, there is oftentimes a situation in which the tenant leaves the premises in a condition that is not compliant with the surrender provision contained in the lease.
- A well-drafted holdover provision combined with a well-drafted surrender provision can provide a landlord leverage to force the tenant to repair the premises to an acceptable condition. If a tenant does not surrender the property in compliance with the surrender provision, the landlord can take the position that no surrender has occurred. Therefore, the holdover provision, applies, and the tenant is liable for the increased rent up to and including the day that the property is surrendered in compliance with the surrender provision.

# Tenant's Right of Offset

- General Law
  - The law in Tennessee is that the landlord's and tenant's obligations are independent of one another.
    - *Smith v. Wiley*, 60 Tenn. 418, 419-20 (1872).
  - Accordingly, if the landlord defaults, the tenant does not have the right to unilaterally offset against rent.
    - *Smith v. Wiley*, 60 Tenn. 418, 419-20 (1872); see also *Estabrook v. Club Chalet of Gatlinburg, Inc.*, 1988 WL 1736, at \*6 (Tenn. Ct. App. 1988).

# Tenant's Right of Offset

- Lease language can and, in a well drafted lease, should clarify the parties respective rights.
- The lease can either provide for offset or restrict the right of offset.
- Lease provisions that provide for or restrict offset rights are enforceable.

# Non-Waiver Provisions

- Typically, a “Non-Waiver Provision” is an overlooked standard provision in a commercial lease. A non-waiver provision is rarely a point of contention in commercial lease negotiations. However, a well-drafted non-waiver provision can form the basis of a well-designed and executed eviction or litigation strategy. Therefore, these provisions should not be neglected, and should be highly scrutinized.

# Non-Waiver Provisions

- In *Brooks*, the term of the lease had expired. The landlord and the tenant were negotiating a new lease.
- During that time the tenant was paying, and landlord was accepting, rent payments equal to the amount due under the standard rent provision. Once the lease negotiations broke down, the tenant moved out, eight months after the expiration of the term.
- The landlord filed suit against the tenant and sought double rent under the holdover provision for the eight months that the tenant was in possession after the expiration of the term of the lease.

# Non-Waiver Provisions

- In *Brooks*, the non-waiver provision stated:
  - Non–Waiver Provisions. The failure of Landlord to insist on a strict performance of any of the terms, conditions and covenants herein shall not be deemed to be a waiver of any subsequent breach or default in the terms, conditions and covenants herein contained except as may be expressly waived in writing.
- The tenant argued that by the landlord’s failure to demand the double rent during the holdover and accepting the standard rent, the landlord had waived any right to such assertions.
- Relying upon the non-waiver provision, the *Brooks* court ruled that the tenant was liable for the double rent.

# Non-Waiver Provisions

- In many cases, whether it be a situation in which a landlord is attempting to negotiate a new lease, attempting to enforce a termination, or a situation in which a landlord is attempting to enforce a separate and distinct provision of the lease, tenants typically try to argue that acceptance of rent constitutes a waiver.
- It is very common for landlords to have rent lockboxes.
- Absent a non-waiver provision, tenant can successfully argue that landlord has accepted the rent and waived potential breaches or alternatively established a new term.
- A well-drafted non-waiver provision can protect landlord from this argument.

# Attorneys Fees

- Like most states, Tennessee follows the “American rule” for awarding attorney fees. The American rule provides that “a party in a civil action may recover attorney fees only if: (1) a contractual or statutory provision creates a right to recover attorney fees; or (2) some other recognized exception to the American rule applies, allowing for recovery of such fees in a particular case.”
  - *Cracker Barrel Old Country Store, Inc. v. Epperson*, 284 S.W.3d 303, 308 (Tenn. 2009).

# Attorneys Fees

- A party may recover its attorney fees “only when a contract *specifically* or *expressly* provides for the recovery of attorney fees.”
  - *Cracker Barrel Old Country Store, Inc. v. Epperson*, 284 S.W.3d 303, 308 (Tenn. 2009).
- Tennessee courts have held that parties were not entitled to recover attorney fees under contractual language providing for the recovery of the following:
  - “all costs and expenses of any suit or proceeding,”
  - “any loss,” all “expenses,” or
  - “any cost, loss, damage, or expense”

# Attorneys Fees

- Who is entitled to attorneys fees?
  - Depending upon the scope of an attorney fees provision, which will likely be the product of contract negotiations, a party to the contract may or may not be entitled to recover its attorney fees.
  - For example, the scope of the attorney fees provision may be one-sided, providing that, in the event Party A to the contract is required to bring a legal action against Party B in order to enforce the terms of the contract, Party B shall be obligated to pay Party A's attorney fees, even if Party A is not the prevailing party, and providing no reciprocal right to Party B.
  - Courts in Tennessee have upheld such one-sided attorneys' fee provisions; particularly where the contract involved sophisticated parties on both sides.

# Attorneys Fees

- How much are you going to get?
  - Where a contract provides for attorneys' fees, "the amount of the fee must be reasonable, even if the contract does not so require."
  - "There is no fixed mathematical rule in [Tennessee] for determining reasonable fees and costs."
  - In Tennessee Supreme Court Rule 8," and " the circumstances of the particular case in light of the relevant factors."
  - A trial court's award of attorneys' fees will generally be upheld on appeal unless the trial court abused its discretion.

**QUESTIONS?**