

GARGANESE | WEISS D'AGRESTA & SALZMAN PA

ATTORNEYS AT LAW

Commercial Landlord-Tenant Law in Florida

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Prepared by: Gary Salzman, BCS, ESQ.

Garganese, Weiss, D'Agresta & Salzman, P.A.
111 N. Orange Avenue, Suite 2000
Orlando, Florida 32801
(407) 425-9566
gsalzman@orlandolaw.net
www.orlandolaw.net

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I. Termination of Commercial Leases

A. Grounds for termination.

Termination or forfeiture of a commercial leasehold is legally justified where there is a breach of a material covenant or condition of the lease or a violation of applicable law authorizing termination. Although there are numerous grounds to terminate a commercial lease, they generally fall within two categories: monetary and non-monetary grounds.

1. Monetary grounds for termination.

A monetary basis to terminate a lease occurs where a party, usually the tenant, fails to meet a financial obligation due to the other party, usually the landlord, under the lease or applicable law. In addition to a tenant's failure to pay rent when due, other monetary grounds for termination would include a tenant's failure to pay its portion of common area maintenance, taxes or the costs of repairs or improvements for the demised premises. Florida courts typically uphold a landlord's termination of a lease based upon monetary grounds, provided however, that the requisite notice has been served and the time to cure has expired.

2. Non-monetary grounds for termination.

Non-monetary grounds for termination of a lease are more problematic and are disfavored by Florida courts. On the tenant's behalf, a lease may be terminated if the landlord materially breaches a material obligation due to the tenant under the lease or applicable law, such as the covenant of quiet enjoyment resulting in a constructive eviction. (See Tenant's remedies below). Another example would be where the landlord is obligated to make repairs to the demised premises, but fails to do so after receiving the requisite notice from the tenant.[1]

Examples of non-monetary grounds that may justify the landlord terminating a lease may include the lapse of a tenant's liability insurance required under the lease, the assignment or subletting of the premises without the landlord's consent and the appointment of a receiver over the tenant.

In order for a non-monetary ground for termination to be judicially enforced, there must be evidence that the tenant's or landlord's interests have been materially prejudiced and a forfeiture will not result in an unconscionable or inequitable result. This rule is illustrated by the following summary of selected cases involving non-monetary grounds for termination of commercial leaseholds.

In *Sharpe v. Sentry Drugs, Inc.*, a lessee sublet a portion of its commercial space in violation of a lease provision requiring prior written consent of the lessor.[2] The lessor gave notice of termination of the lease based upon this breach and sued for termination. The trial court agreed stating that, although the sublease was a breach of the primary lease, the breach was "not sufficient to constitute a forfeiture of the main lease agreement as a matter of law."[3] The appellate court affirmed the lower court's decision and based its decision upon the equitable principle that a court may refuse to enforce a forfeiture where the effect of doing so would result in an unconscionable, inequitable or unjust eviction under the circumstances.[4] In

[1] Fla. Stat. § 83.201 (2017).

[2] 505 So. 2d 618, 618 (Fla. 3d DCA 1987).

[3] *Id*. at 619.

[4] *Id.*

other words, subletting in violation of the primary lease was not material enough to prejudice the lessor's interests so as to justify a forfeiture.[5]

In *Great Southern Aircraft Corp. v. Kraus*, the court held that a non-assignment clause in a lease does not prevent the lessee from mortgaging the leasehold estate.[6] The court based its decision, at least in part, upon the principle that a covenant restricting a tenant's power to transfer the leasehold is to be strictly construed in favor of alienation.[7]

In *Gooding's Supermarket, Inc. v. Net Realty Holding Trust,* Goodings was one of Net Realty's shopping center tenants.[8] Under the lease, Net Realty was responsible to maintain the common areas and indemnify Goodings from all claims arising out of the common area. A lawsuit was later commenced by Goodings to terminate the lease. The grounds for termination were that Net Realty breached the lease by not carrying the proper insurance for its indemnity obligations. The trial court ruled in favor of Goodings. The appellate court affirmed, holding that Net Realty materially breached the lease and was given sufficient notice to cure the default, but failed to do so.[9]

In *Fowler v. Resash Corp*., a tenant made unauthorized improvements to the premises under a 99-year commercial lease.[10] As a result, the landlord declared a default of the lease. The landlord re-let the premises for a substantial increase in rent. In holding for the tenant, the appellate court determined that the landlord's termination of the lease, which had approximately 50 years left before it expired, resulted in the landlord becoming inequitably and unjustifiably enriched at the expense of the tenant.[11] The court also determined that the landlord had not suffered any actual damages as a result of the improvements made by the tenant.[12]

Many commercial leases contain a clause that states the appointment of a receiver over the tenant constitutes a material breach of the lease justifying termination. Whether this is an enforceable clause under Florida law is not clear, since no Florida cases on point were found. However, the following out-of-state cases should be persuasive on any Florida courts.

In *J. H. Carson v. Imperial '400' National, Inc.*, the Supreme Court of North Carolina stated that a provision in a lease authorizing a lessor to terminate the lease upon the appointment of a receiver was not void and was not contrary to public policy nor prohibited by statute.[13]

In *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.*, a commercial lease provided that the appointment of a receiver over the tenant's assets constituted a breach of the lease.[14] A receiver was later appointed over a sub-tenant. As a result, the landlord declared a breach of the lease and sued for termination. In holding for the landlord, the California court reasoned that this type of a lease provision protects an important

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[5] *See id*.

[6] 132 So. 2d 608, 609 (Fla. 3d DCA 1961).

[7] *Id.*

[8] 703 So. 2d 1136, 1137 (Fla. 5th DCA 1997).

[9] *Id*. at 1137-38.

[10] 469 So. 2d 153, 154 (Fla. 3d DCA 1985).

[11] *Id.*

[12] *Id*.

[13] 147 S.E.2d 898, 900 (N.C. 1966).

[14] 195 Cal. App. 3d 1032, 1042 (Cal. Ct. App. 1st 1987).

interest of the lessor. The court noted that the appointment of a receiver often results in drastic disruptive consequences to existing business relationships. Thus, the appellate court affirmed the trial court's finding that there was a material breach justifying the landlord's right to terminate the lease and retake possession of the premises.[15]

II. Waiver Of Grounds For Termination.

By accepting the full amount of rent that is due with knowledge of the tenant's breach of the lease for nonpayment of rent, the landlord will be deemed to have waived any right to terminate the lease and retake possession of the premises as a result of the tenant's failure to pay rent.[16] This statutory waiver follows the common law rule that a party to a contract may waive a default thereunder by express agreement or by conduct.

However, most leases contain "anti-waiver" provisions stating that the landlord's acceptance of any rent or any action of forbearance shall not be deemed a waiver of any rights that the landlord has as of that date.[17] The following is an example of a typical "anti-waiver" provision:

> This lease may only be modified, altered, or amended, in whole or in part, by a written instrument setting forth such changes and signed by all parties hereto. This lease constitutes the entire agreement and understanding between the parties and all other agreements and understandings between them, whether oral or written, are hereby deemed void and merged into this lease. The landlord's acceptance of rent, or any act of forbearance concerning any breach or violation of this lease by the tenant shall not be construed as a waiver of any rights the landlord has hereunder. No delay or omission on the part of the landlord in exercising any right hereunder shall operate as a waiver of such right or any other right.

Notwithstanding a lease provision similar to the foregoing, at least one Florida court has held that the landlord's conduct of accepting late rent was not only a waiver of the tenant's default for failure to pay rent, but was also a waiver of the anti-waiver provision itself.[18] In that case, however, the lessor accepted the late rent payments without protest and never notified the lessee that it was in default of the lease.[19]

Florida's parol evidence rule also provides some protection against a party to a lease alleging that its terms were modified or waived by an oral agreement. The rule is that, if the terms of a contract are unambiguous and the contract is a complete agreement, those terms are not subject to modification, variance or contradiction by parol (oral) evidence.[20] If the lease agreement is ambiguous as to the parties' intent on any matter, parol evidence will be admissible on the issue.[21] "The parol evidence rule serves as a 'shield' to protect a valid, complete and unambiguous written instrument from any verbal assault that would contradict,

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[15] *Id.* at 1055.

[16] Fla. Stat. § 83.202 (2017).

[17] *Philpot v. Bouchelle,* 411 So. 2d 1341, 1343 (Fla. 1st DCA 1982).

[18] *Protean Investors, Inc. v. Travel, Etc., Inc.*, 499 So. 2d 49, 50 (Fla. 3d DCA 1986).

[19] *Id*.

[20] *See Titusville Assocs., Ltd. v. Barnett Banks Trust Co.*, 591 So. 2d 609, 611 (Fla. 1991); *see also Co & Co Enters., Inc. v. Robertson*, 761 So. 2d 1179, 1179 (Fla. 4th DCA 2000); *Newbern v. Am. Plasticraft, Inc.,* 721 So. 2d 351, 352 (Fla. 2d DCA 1998); *Polk v. Crittenden*, 537 So. 2d 156, 159 (Fla. 5th DCA 1989); *F.D.I.C. v. Hemmerle*, 592 So. 2d 1110, 1113-14 (Fla. 4th DCA 1991).

[21] *3679 Waters Ave. Corp. v. Water St. Ovens, Ltd.*, 779 So. 2d 349, 351 (Fla. 2d DCA 2000).

add to, subtract from it, or affect its construction."[22] Since the rule only applies if the parties' agreement is unambiguous and complete, it is important that the lease expressly state that it is "the entire agreement between the landlord and the tenant and all other oral or written understandings and agreements are merged into the lease and are deemed void."

A common claim by tenants is that a landlord's acceptance of late rent payments on several prior occasions evidences a waiver by conduct of any strict compliance for when the rent is due under the lease. To undermine this defense, many leases include the following type of "anti-waiver" clause to prevent the assertion of a continuing waiver:

The landlord's acceptance of rent, or any act of forbearance or waiver of any breach or violation of this lease by the tenant shall not be construed as a continuing waiver or consent to any subsequent breach or violation by the tenant and shall not bar landlord's right to demand strict compliance with that provision or any other provision of this lease. No course of dealing between the landlord and the tenant shall constitute a waiver of any of the landlord's rights or any of the tenant's obligations as due hereunder.

This type of clause, in most instances, will prevent a tenant from successfully making a claim that the landlord waived strict compliance with the lease as a result of prior acts of forbearance or a course of conduct by the landlord.[23]

III. Notice And Right To Cure.

Florida Statutes and most leases require one party to a lease to give the other party notice of a material default and an opportunity to cure the default. If after proper notice, the defaulting party fails to cure, the non-defaulting party may terminate the lease. Unless the lease states otherwise, the time period for the notice depends upon the term of the tenancy. Under Florida law, any tenancy is deemed a "tenancy at will" unless it is in writing signed by the lessor.[24] If the tenancy is reflected by a written instrument, but the term of the tenancy is unlimited, the tenancy is also deemed to be a tenancy at will.[25]

If the tenancy is at will, its duration is determined by the periods of time at which rent is payable.[26] If rent is paid weekly, the tenancy is from week to week.[27] If rent is paid monthly, the tenancy is from month to month.[28] If rent is paid quarterly, the tenancy is from quarter to quarter.[29] If rent is paid yearly, the tenancy is from year to year.[30]

A tenancy at will may be terminated by either party giving notice as follows:

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[22] *Crittenden*, 537 So. 2d at 159 (quoting *Sears v. James Talcott, Inc.,* 174 So. 2d 776, 778 (Fla. 2d DCA 1965)).

[23] *Kelly Tractor Co. v. R.J. Canfield Contracting, Inc.*, 579 So. 2d 261, 263 (Fla. 4th DCA 1991).

[24] Fla. Stat. § 83.01 (2017).

[25] Fla. Stat. § 83.02. (2017).

[26] Fla. Stat. § 83.01.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

(1) Where the tenancy is from year to year, by giving not less than 3 months' notice prior to any annual period;

(2) Where the tenancy is from quarter to quarter, by giving not less than 45 days' notice prior to the end of any quarter;

(3) Where the tenancy is from month to month, by giving not less than 15 days' notice prior to the end of any monthly period; and

(4) Where the tenancy is from week to week, by giving not less than 7 days' notice prior to the end of any weekly period.[31]

If the tenancy is not at will, notice must be given in accordance with the terms of the lease, but not less than 3 days' notice for a default in the payment of rent. If the lease is silent on the matter, at least 3 days' notice must be given to cure any default in the payment of rent and at least 15 days' notice must be given to cure any material breach of the lease, other than non-payment of rent.[32] Notice must be served in the manner required under the lease. If the lease is silent on the matter, notice must be by actual delivery to the tenant or, if the tenant is absent from the demised premises, by leaving a copy at the premises.[33]

If a tenant desires to terminate the lease for the landlord's failure to make repairs, the tenant must follow the procedure set forth in the lease. Where the lease is silent on the issue, but it expressly places the obligation to make the repairs upon the landlord, the tenant must give the landlord at least 20 days written notice. [34] As a prerequisite, the landlord's failure to make the repairs must render the premises completely "untenantable."[35] Under these circumstances, the tenant's notice must demand that the landlord make specifically described repairs or maintenance, and state the tenant will withhold rent for the next rental period and thereafter until the repair or maintenance is completed.[36] If the landlord fails to comply with the notice, the tenant may then abandon the premises, retain the rent withheld, terminate the lease and avoid any liability for future rent or charges.[37]

IV. Business Practices For Landlord-Tenant Disputes.

Although a landlord's or tenant's termination of a lease must comply with the pre-requisites of the lease and Florida law, proving the presence of lawful grounds to terminate the lease is a separate issue of concern. Monetary defaults are usually straight forward, but may become unclear under certain circumstances.

For example, assume that a lease requires rent to be paid on the first of each month and after receiving an appropriate notice from the landlord, the tenant requests an extension of time to make the payment under the notice. The landlord refuses and proceeds with an eviction action. The tenant, in defense,

[31] Fla. Stat. § 83.03 (2017).

[32] Fla. Stat. § 83.20(2)–(3) (2017).

[33] Fla. Stat. § 83.20(3).

[34] Fla. Stat. § 83.201.

[35] *Id.*

[36] *Id.*

[37] *Id.*

deposits the rent in the registry of the court and defends on the grounds that the landlord had orally agreed to the extension.

If the landlord had made a contemporaneous memorandum of the conversation or written the tenant a confirming letter the day the extension was refused, the landlord would be in a much stronger evidentiary position to respond to the tenant's defense. Lending institutions are faced with this "oral extension" defense frequently. In response, many lending institutions have internal procedures that require all loan officers having any oral communications with their borrowers to maintain contemporaneous telephone logs and send confirming letters of important discussions. This practice serves two functions. First, it provides a written instrument for the parties to refer back to in the event of a good faith misunderstanding. Second, it produces physical evidence of the facts at the time they occurred. This physical evidence, if made contemporaneous with the conversation and in the normal course of the landlord's business, is generally admissible in court. When faced with a "he said-she said" defense, the party who also has a contemporaneous document evidencing the conversation will more often than not prevail in the dispute.

V. Pre-Suit "Self-Help."

A common example of a landlord using "self-help" to retake possession of the demised premises is where a landlord unilaterally changes the locks for the premises during the night. Except under very limited circumstances, that action could subject the landlord to liability for damages under the lease and Florida law.[38]

A landlord may retake possession of leased premises in three exclusive ways: (1) the landlord pursues a court action, such as an ejectment action or an eviction lawsuit; (2) the tenant voluntarily surrenders possession of the premises; or (3) the tenant abandons the premises.[39] "Self-help" is only available where the tenant either surrenders possession or abandons the premises.

To prevent any dispute over whether the tenant voluntarily surrendered the premises, a surrender should be reflected in a written surrender agreement signed by the tenant. Otherwise, the landlord should proceed with the judicial process or determine whether the circumstances constitute an abandonment.

In considering whether an abandonment has taken place, the landlord should be certain that, at a minimum, a statutory presumption of abandonment will arise before "self-help" is used to retake possession.[40] This presumption arises if the landlord reasonably believes the tenant has been absent from the premises for 30 consecutive days, the rent is past due, proper notice has been served and 10 days have elapsed since service of the notice.[41] If any one of these elements are not present, the presumption of law will not be available to the landlord.[42] In that event, the landlord will have the burden to prove in court that the premises were, in fact, abandoned. Other circumstantial evidence may prove actual abandonment, such as the termination of all utility services, the removal of the tenant's property from the premises, and the tenant having all mail forwarded to another location.

[38] *See id.* § 83.05 (2016); *see also Vines v. Emerald Equip. Co.*, 342 So. 2d 137, 137 (Fla. 1st DCA 1977).

[39] Fla. Stat. § 83.05(2)(a)-(c).

[40] *See* Fla. Stat. § 83.05(3)(a)-(c).

[41] *Id*.

[42] *Bobo v. Vanguard Bank and Trust Co.*, 512 So. 2d 246, 247 (Fla. 1st DCA 1987).

VI. Selected Landlord-Tenant Disputes.

1. Duress hypothetical.

After signing a favorable seven year lease, a tenant invests a substantial amount of funds for the improvement of the demised premises. At the end of the leasehold, the landlord refuses to extend the original lease, but insists that the tenant sign a new lease with monetary and non-monetary terms that are much more favorable to the landlord. Since the tenant would suffer a substantial economic loss if it is required to relocate, the tenant feels that it has no alternative but to sign the new lease. Additionally, the landlord threatens to evict the tenant and sue for hold-over double rent if the tenant does not sign the new lease. The tenant does so under protest.

After a short period of time, a dispute arises between the landlord and the tenant. One of the terms in the new lease is dispositive on the issue in favor of the landlord. In response, the tenant attempts to avoid that term by alleging that the new lease was procured by duress. Under these assumed facts, however, the tenant should not prevail on this defense.

"Duress is a condition of mind produced by an improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or make a contract not of his own volition."[43] A particular course of action taken of one's own volition, which is decided upon in a deliberate and considered choice cannot be the product of duress.[44]

Where there are adequate legal remedies available to challenge a threat, the threatened action cannot constitute duress.[45] Duress also does not exist where a party threatens to do that which the party has a legal right to do, including threatening to exercise civil remedies provided by a contract, or to sue on a past-due debt.[46]

Most of the cases involving economic duress are in the context of a creditor-debtor relationship. Nonetheless, they are applicable to a commercial landlord-tenant relationship.

In *Spillers v. Five Points Guaranty Bank*, a corporate borrower renewed a loan with a bank. The renewal loan was payable in 30 days and was secured by the borrower's inventory, furniture, fixtures and equipment, as well as a third mortgage on the homes of the borrower's principals. The borrower failed to pay the loan when due and the bank commenced foreclosure proceedings. The defendants raised the defense of duress, alleging that the security interests and mortgage were void or voidable because they were induced by the bank's threats to "put them out of business and ... to close down their business."[47]

The *Spillers* court held that the security interests and mortgage were not granted under duress or undue influence, even though the defendants' refusal would have caused the bank to accelerate the debt and foreclose on the collateral for the initial loan. The court recognized that the bank's threat to do so did not constitute legal duress because the bank had a right to follow that course of action. "Business compulsion is not established merely by proof that consent was secured by the pressure of financial circumstances ...

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[43] *City of Miami v. Kory*, 394 So. 2d 494, 497 (Fla. 3d DCA 1981), *rev. den.* 407 So. 2d 1104 (Fla. 1981) (quoting *Herald v. Hardin*, 116 So. 863, 864 (Fla. 1928)).

[44] *See Spillers v. Five Points Guar. Bank,* 335 So. 2d 851, 852-53 (Fla. 1st DCA 1976).

[45] *Kory*, 394 So. 2d at 499.

[46] *Id*. at 498.

[47] *Spillers*, 335 So. 2d at 852.

The law provided certain means for enforcement of their claims by creditors. It is not duress to threaten to take these means."[48]

Chouinard v. Chouinard was an action between family members to set aside two promissory notes based upon allegations that they were procured by duress.[49] In that case, the federal appellate court held that economic duress does not exist where a "person enters into a contract as a result of the pressure of business circumstances, financial embarrassment, or economic necessity."[50] Unless unlawful pressure is used, there cannot be any economic duress. "Mere hard bargaining positions, if lawful, and the press of financial circumstances, not caused by the (party against whom the contract is sought to be voided), will not be deemed duress."[51]

2. "Going Dark" hypothetical.

A shopping center landlord has a ten year lease with an anchor tenant. With five years left on the lease, the tenant determines that its monthly operating losses for its store at the leased premises well exceed the amount of the monthly rental. Further, it has been offered a long-term lease within one mile at a location projected to be extremely profitable. The tenant closes its store at its current location (thereby "going dark"), but it continues to timely pay all monthly rentals in accordance with the lease. The anchor tenant's "going dark" has a widespread negative impact on the shopping center's other tenants, as well as the overall marketability of the shopping center. The landlord must determine whether it may declare a breach of the anchor tenant's lease for "going dark." The answer depends on whether the lease expressly or impliedly includes a covenant of continuous operation.

Assuming there is no such express provision in the lease, the court must interpret the entire lease to determine whether the parties intended it to include an implied covenant of continuous operation. If the court finds that there was no such intent, the anchor tenant's "going dark" will not be deemed a breach of the lease, provided it continues to timely pay rent. Courts have considered a variety of facts and circumstances to determine whether a lease implies such a covenant in the absence of an express covenant.[52]

Does the lease provide for a large portion of the annual rent to be based upon a percentage of gross sales?[53] Is the tenant the only anchor tenant for the entire property? Is the base rent fairly below the market

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[48] *Id*. at 853.

[49] *Chouinard v. Chouinard*, 568 F.2d 430, 431 (5th Cir. 1978).

[50] *Id*. at 434.

[51] *Id.* (quoting *Bus. Incentives Co. v. Sony Corp. of Am.*, 397 F. Supp. 63, 69 (S.D.N.Y. 1975)).

[52] *See Lincoln Tower Corp. v. Richters Jewelry Co.*, 12 So. 2d 452 (Fla. 1943); *see also, e.g., Mayfair Operating Corp. v. Bessemer Prop.*, 7 So. 2d 342, 343 (Fla. 1942) (finding that a covenant was implied when lease did not authorize closing, but instead required lessee to use best efforts to maintain the highest volume of business on the premises, and the actual closing for four months substantially reduced the business' revenue); *Jerrico, Inc. v. Wash. Nat'l Ins. Co.*, 400 So. 2d 1316, 1318 (Fla. 5th DCA 1981) (finding requirement in lease for lessee to show gross receipts at the end of each month and that rent was based on receipts from business was enough to imply covenant); *Slater v. Pearle Vision Ctr., Inc*., 546 A.2d 676, 679-80 (Pa. Super. Ct. 1988) (finding requirement to keep premises in a manner consistent with the general character of the shopping mall was viable to state a claim for an implied covenant to occupy premises); *Fifth Ave. Shopping Ctr. v. Grand Union Co.*, 491 F. Supp. 77, 80-81 (N.D. Ga. 1980) (when amount of rent generated by percentage payment clause will be substantially greater than minimum rent, court will infer an implied covenant to operate throughout lease); *Ingannamorte v. Kings Super Mkts., Inc*., 260 A.2d 841, 844 (N.J. 1970) (finding that when lease contained provision that other stores could not compete with sale of "meats, fish, fruits and vegetables" there was an implied covenant to continually operate).

[53] Unless the percentage of sales is the only basis to compute rent, this factor alone is not sufficient to imply

rent for the premises in consideration of the landlord receiving a percentage of sales as additional rent? Does the lease affirmatively require (as opposed to permit) the tenant to use and operate the premises for a particular purpose? Did the landlord incur significant expenses constructing the premises specifically for the tenant's specific use and occupation? Was the landlord's construction of the premises a condition precedent to the tenant's obligations under the lease? Was the landlord required to transfer to the tenant any investment or tax credits for the construction of the premises?

Does the lease restrict the tenant from assigning or subletting the lease without the consent of the landlord? Does the lease prohibit the landlord from leasing any adjacent premises to a competing business?

Did the lease require (again as opposed to permit) the tenant to commence operations within a specific period of time? Does the lease grant the tenant the right to vacate the premises during the term of the lease upon giving notice?

As one can see, whether the parties intended the tenant to be bound by an implied covenant of continuous operation depends in large part upon circumstantial evidence. If the landlord intends to prevent any tenant from "going dark," the lease should contain an express covenant of continuous operation.

3. Obligation to mitigate damages.

Although every claimant generally has a duty to mitigate their damages, a landlord's duty to use reasonable efforts to mitigate its damages does not arise until the landlord retakes possession of the premises. *Fairway Mortg. Solutions, Inc. v. Locust Gardens*, 988 So. 2d 678, 681 (Fla. 4th DCA 2008*); see also Coast Fed. Sav. and Loan Ass'n v. DeLoach*, 376 So. 2d 1190, 1190-91 (Fla. 2d DCA 1979) (holding that it was error for the trial judge to reduce landlord's recovery for failure to mitigate its damages when the trial judge found that the landlord never retook possession of the leased premises).

VII. Landlord's Remedies

A. Receivers.

Some leases provide for the appointment of a receiver over the premises or the leasehold in the event of a breach or default. Whether or not a lease expressly provides for the appointment of a receiver, a court may exercise its discretion in this regard to preserve the premises from irreparable harm or to otherwise prevent irreparable harm to the parties or the public. The appointment of a receiver has been upheld in a variety of situations.

In *Mayflower Assocs., Inc. v. Elliott*, the landlord declared a breach of a 99-year commercial lease for the tenant's failure to pay municipal and county taxes.[54] The breach occurred only two years into the lease period. The landlord terminated the lease after giving the tenant written notice of default and a 30 day opportunity to cure by paying the delinquent taxes. The landlord thereafter filed a lawsuit requesting that a receiver be appointed pursuant to two provisions in the lease. One provision granted the landlord a first lien on the rents and profits resulting from the tenant's use of the premises. Another provision specifically provided for the appointment of a receiver to protect the landlord's interests upon a default by the tenant. The Florida Supreme Court affirmed the trial court's appointment of a receiver to protect the landlord's

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the covenant. *Diltz v. J&M Corp*., 381 So. 2d 272, 273-74 (Fla. 3d DCA 1980).

[54] 81 So. 2d 719, 719 (Fla. 1955).

interests and to enforce the provisions of the lease. The court, however, stated that its conclusion might have been different had the tenant offered or tendered the delinquent taxes to avoid an inequitable forfeiture of the leasehold.[55]

In *Interdevco, Inc. v. Brickellbanc Sav. Assoc.*, a borrower defaulted on a construction loan prior to completing the construction of a hotel.[56] In order to preserve the unrealized value of the real property, a receiver was appointed to complete the construction and then sell or lease the property.[57] One can readily ascertain the applicability of the *Interdevco* case to a landlord-tenant relationship. Pursuant to a commercial lease, a tenant could construct improvements on the demised premises, but fail to complete the construction. In order to protect the landlord's interests, a receiver could be appointed to complete the construction and re-let the premises; all for the account of the original tenant.

In *Buckley Towers Condo., Inc. v. Buchwald*, a condominium association, as lessee, and its developer, as lessor, entered into a 99-year community facility lease.[58] After a dispute over the lease, the developer was awarded a monetary judgment for unpaid rents due under the lease. Nonetheless, the association refused to pay the rents found due. Based upon this refusal, the trial court granted the developer's motion for sequestration of the association's funds as security for payment of the rents due under the lease. The trial court also appointed a receiver to manage the collection of those funds and distribute what was due to the developer. The appellate court affirmed the trial court's ruling, holding the order was within the sound discretion of the court.[59]

B. Distress Writs.

> Any person to whom any rent or money for advances is due or the person's agent or attorney may file an action in the court in the county where the land lies having jurisdiction of the amount claimed, and the court shall have jurisdiction to order the relief provided in this part. The complaint shall be verified and shall allege the name and relationship of the defendant to the plaintiff, how the obligation for rent arose, the amount or quality and value of the rent due for such land, or the advances, and whether payable in money, an agricultural product, or any other thing of value.

Fla. Stat. § 83.11 (2017).

> 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 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

[55] *Id.* at 720.

[56] 524 So. 2d 1087, 1088-89 (Fla. 3d DCA 1988).

[57] *Id.*

[58] 340 So. 2d 1206, 1207 (Fla. 3d DCA 1976).

[59] *Id.* at 1209.

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.

Fla. Stat. § 83.12 (2017).

C. Injunctions.

A temporary injunction is an extraordinary remedy. The movant must prove all essential elements for a temporary injunction with competent, admissible evidence.[60] Those elements are as follows: (1) the likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) a clear legal right to the relief requested and a substantial likelihood of success on the merits; and (4) the injunction is in the public interest.[61]

A prospective irreparable injury must be more than a remote possibility; it must be imminent and probable.[62] There must be a reasonable probability, not a bare possibility, that a real irreparable injury will occur.[63] If the irreparable injury is doubtful or contingent, injunctive relief may not be granted.[64]

Irreparable harm and the lack of an adequate remedy at law are not established where any potential loss can be adequately compensated by a monetary judgment.[65] The irreparable injury must be of a peculiar nature, so that monetary compensation will not be adequate.[66] Similarly, collectability of a monetary judgment is not to be considered by the court in determining whether the movant has an adequate legal remedy.[67]

In the context of landlord-tenant cases, injunctions have been granted to enforce specific, unambiguous restrictive covenants for the exclusive use of the premises.[68] These restrictive covenants are more commonly known as non-competition provisions. To be enforceable, a restrictive covenant in a lease must be clearly expressed in positive terms.[69] Furthermore, the tenant must prove that it will be irreparably harmed unless the non-competition clause is enforced by an injunction.[70]

A lease provision that granted a tenant the "privilege" to operate a particular type of business did not clearly and positively express an intent that the tenant would be able to prohibit the landlord from leasing to a competing business.[71] Hence, the court did not grant an injunction.

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[60] *State Agency for Health Care Admin. v. Cont'l Car Servs.*, 650 So. 2d 173, 175 (Fla. 2d DCA 1995).

[61] *Richard v. Behavioral Healthcare Options, Inc.*, 647 So. 2d 976, 978 (Fla. 2d DCA 1994).

[62] *City of Coral Springs v. Fla. Nat'l Props., Inc.*, 340 So. 2d 1271, 1272 (Fla. 4th DCA 1976).

[63] *Miller v. MacGill*, 297 So. 2d 573, 574 (Fla. 1st DCA 1974); *A1A Mobile Home Park, Inc. v. Brevard Cnty.*, 246 So. 2d 126, 128 (Fla. 4th DCA 1971).

[64] *Sanstrom v. Garren*, 187 So. 2d 366, 367 (Fla. 3d DCA 1966); *First Nat'l Bank in St. Petersburg v. Ferris*, 156 So. 2d 421, 424 (Fla. 2d DCA 1963).

[65] *B.G.H. Ins. Syndicate, Inc. v. Presidential Fire & Cas. Co.*, 549 So. 2d 197, 198 (Fla. 3d DCA 1989).

[66] *First Nat'l Bank*, 156 So. 2d at 423.

[67] *Employee Benefit Plans, Inc. v. Radice Corporate Ctr. I, Inc.*, 593 So. 2d 1125, 1127 (Fla. 4th DCA 1992).

[68] *M.G.K. Partners v. Cavallo*, 515 So. 2d 368, 369 (Fla. 4th DCA 1987).

[69] *Reed v. O.A. & E., Inc.,* 390 So. 2d 487, 489 (Fla. 4th DCA 1980).

[70] *Contemporary Interiors v. Four Marks, Inc.*, 384 So. 2d 734, 735-36 (Fla. 4th DCA 1980).

[71] *Reed*, 390 So. 2d at 489.

Generally, a tenant is not entitled to an injunction against the landlord initiating an eviction action pending resolution of the tenant's declaratory judgment action to interpret the terms of the lease.[72] This is because the same issues raised in the tenant's declaratory judgment action can be asserted as defenses in any eviction action. As a result, the tenant has an adequate remedy at law and, thus, cannot prove all essential elements for an injunction.[73]

Injunctions have been granted in favor of landlords preventing a tenant from violating a specific use clause in a lease. For example, an automobile dealership was enjoined from erecting lights on its lot that were detrimental to the adjoining drive-in theater owned by the lessor.[74] The dealership was enjoined because its lease specifically prohibited its use of the premises in any way that was detrimental or competitive with the lessor's adjacent property. The lease also prohibited the dealership from erecting any sign or lights that would in any way obstruct the view of the theater's sign or would be objectionable to the drive-in theater. The lighting used by the dealership was found to be a substantial interference with the lessor's theater as contemplated by the restrictive covenant in the dealership's lease. [75]

Injunctions have also been issued for the enforcement of implied and expressed covenants of continuous operation. Where a lease expressly required the tenant to remain open for business "year round," except for holidays and after ordinary business hours, and the rent was based upon a percentage of sales, a mandatory injunction was entered requiring the tenant to remain open in accordance with the lease.[76] This injunction was affirmed based upon the court's determination that further breaches of the covenant could not be adequately compensated by an action at law and the injunction was necessary to protect and maintain the character of the entire property for the benefit of all of its tenants.[77]

D. Collection issues.

Unless otherwise stated in the lease, a landlord in Florida has three options when a tenant defaults under the lease. First, the landlord may re-take possession of the premises for the account of the landlord. If this is done, the landlord releases the tenant from any further obligations under the lease.

The second option is for the landlord to re-take possession of the premises for the tenant's account. In the event the landlord does so, the tenant remains liable for all obligations under the lease. However, if the premises are re-let, the damages to be assessed against the tenant will be the difference between the rentals.

The landlord's third option is to simply do nothing and sue the tenant as the rentals become due under the lease. If the subject lease has an acceleration clause, the landlord may also accelerate the entire balance of the rent to be immediately due and sue for that amount. In that case, the court will reduce the total accelerated rent by the present value of the rental stream.

Whether the tenant has the ability to pay a monetary judgment will weigh heavily on the landlord's election of which option to pursue. It may be that the tenant is not collectible. In that case, the tenant may agree to voluntarily surrender the premises for the landlord's account within a short period of time so that the

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[72] *See Hutchinson v. Kimzay of Florida, Inc.,* 637 So. 2d 942, 944 (Fla. 5th DCA 1994).

[73] *Id.*

[74] *Grentner v. Le Jeune Auto Theater, Inc.,* 85 So. 2d 238, 241 (Fla. 1956).

[75] *Id.* at 241.

[76] *Lincoln Tower Corp.*, 12 So. 2d at 454.

[77] *Id.*

landlord may re-let the premises and minimize its lost rent. On the other hand, the tenant may be a publicly traded company that has a multi-million dollar net worth and the rental market has declined since the lease was signed. In that event, the landlord may desire to accelerate the rent, undertake protracted litigation and seek a monetary judgment for the full amount of rent due. These types of strategy decisions are best analyzed after reviewing all available information on the tenant's financial condition and the potential defenses being raised.

E. Attachment, garnishment & levy.

Florida Statutes provide for a variety of pre-judgment and post-judgment remedies to collect money due a creditor, such as a landlord. These remedies are available to a landlord in addition to its remedies under Chapter 83, *Florida Statutes*.

A writ of attachment creates a lien against the non-exempt real or personal property of the tenant before or after a debt becomes due. A writ of attachment may be obtained when a debt is due where the tenant-debtor:

(1) Will fraudulently part with the property before judgment can be obtained against him or her.

(2) Is actually removing the property out of the state.

(3) Is about to remove the property out of the state.

(4) Resides out of the state.

(5) Is actually moving himself or herself out of the state.

(6) Is about to move himself or herself out of the state.

(7) Is absconding.

(8) Is concealing himself or herself.

(9) Is secreting the property.

(10) Is fraudulently disposing of the property.

(11) Is actually removing himself or herself beyond the limits of the judicial circuit in which he or she resides.

(12) Is about to remove himself or herself out of the limits of such judicial circuit.[78]

Any landlord-creditor may obtain a writ of attachment on a debt not yet due when the tenant-debtor:

(1) Is actually removing the property out of the state.

(2) Is fraudulently disposing of the property to avoid the payment of his or her debts.

[78] Fla. Stat. § 76.04 (2017).

(3) Is fraudulently secreting the property to avoid payment of his or her debts.[79]

Once the writ is issued and served, the landlord-creditor must complete the action lawsuit and then execute upon the property through a sheriff's sale.[80] Before any writ of attachment will issue, however, the landlord-creditor must post a bond equal to double the debt demanded. This bond will be security for the tenant-debtor should the court later determine the writ was improperly obtained.[81] After a monetary judgment is obtained, a writ of garnishment is available to a landlord-creditor to collect non-exempt money owed to a tenant by a third-party.

> After judgment has been obtained against defendant but before the writ of garnishment is issued, the plaintiff, the plaintiff's agent or attorney, shall file a motion (which shall not be verified or negative defendant's exemptions) stating the amount of the judgment. . . . [82]

Even before a monetary judgment is obtained, a writ of garnishment is available to a landlord-creditor to collect non-exempt money owed to a tenant by a third-party upon compliance with the following procedure:

> (2) To obtain issuance of the writ, the plaintiff, or the plaintiff's agent or attorney, shall file in the court where the action is pending a verified motion or affidavit alleging by specific facts the nature of the cause of action; the amount of the debt and that the debt for which the plaintiff sues is just, due, and unpaid; that the garnishment is not sued out to injure either the defendant or the garnishee; and that the plaintiff believes that the defendant will not have in his or her possession, after execution is issued, tangible or intangible property in this state and in the county in which the action is pending on which a levy can be made sufficient to satisfy the plaintiff's claim. The writ of garnishment shall set forth a notice to the defendant of the right to an immediate hearing for dissolution of such writ pursuant to section 77.07. Upon issuance of the writ of garnishment, the clerk of the court shall provide by mail a copy of the writ to the defendant.
>
> (3) Except when the plaintiff has had an attachment writ issued, no writ of garnishment before judgment shall issue until the plaintiff, or the plaintiff's agent or attorney, gives a bond with surety to be approved by the clerk payable to the defendant in at least double the amount of the debt demanded, conditioned to pay all costs, damages, and attorney's fees that the defendant sustains in consequence of the plaintiff's improperly suing out the writ of garnishment. A garnishment bond is not void or voidable because of an informality in it, nor shall the obligors be discharged because of the informality, even though the garnishment is dissolved because of the informality.
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> (4) The motion or pleading need not negative any exemptions of the defendant.[83]

A continuing writ of garnishment is also available to collect a debtor's non-exempt wages, provided the debtor is not considered the "head of household."

> Notwithstanding any other provision of this chapter, if salary or wages are to be garnished to satisfy a judgment, the court shall issue a continuing writ of garnishment to the judgment

[79] Fla. Stat. § 76.05 (2017).

[80] Fla. Stat. § 76.14 *et seq* (2017).

[81] Fla. Stat. § 76.12 (2017).

[82] Fla. Stat. § 77.03 (2017).

[83] Fla. Stat. § 77.031 (2017).

> debtor's employer which provides for the periodic payment of a portion of the salary or wages of the judgment debtor as the salary or wages become due until the judgment is satisfied or until otherwise provided by court order. . . .[84]

F. Fraudulent transfers & tracing assets.

Often, a small corporate tenant may go out of business and default on its lease with the landlord. The landlord may obtain a monetary judgment against the corporate tenant only to learn that the corporation no longer has any assets to satisfy the judgment. If the corporation had substantial assets at one time, it is prudent for the landlord to learn how those assets were disposed of by the tenant. Given the right facts, the individual principals of the corporate tenant, or other persons or entities, may be liable for the landlord's judgment.

As a general principle of Florida common law, if the assets of a corporation are transferred to another person or entity without that transferee paying adequate consideration in return for the assets, that transferee may thereby become liable to the corporation's creditors to the extent of the assets transferred. The following cases illustrate this principle of law.

In *Standard Accident Ins. Co. v. Hancock*, the defendant executed a mortgage to his insurance company for an amount greater than his debt.[85] The mortgage was approximately $8,000 more than his debt to cover an anticipated judgment against him in a pending lawsuit. This was held to be fraudulent and invalid as to the judgment creditor.[86]

In *Jones v. Wear*, the Florida Supreme Court held:

> It is a well-settled principle of law that an insolvent debtor may make a valid conveyance of property to a creditor for the purpose of either securing or discharging a pre-existing debt, but it also well-settled that for such conveyance to be valid there must be an agreement at the time between the parties that the conveyance shall discharge the debt or, if the conveyance be made to secure the debt, that such is the purpose of the conveyance. . . .
>
> A conveyance by a debtor to his creditor is voluntary and without consideration where no acquittance of the debt is given, and there is no consent or understanding that the conveyance is to discharge the debt, and the transfer of property for antecedent debts, without extinguishment or surrender of such debts and of the old securities therefor, is not sufficient to constitute the transferee a bona fide purchaser for a valuable consideration.[87]

In *Wieczoreck v. H & H Builders, Inc.*, the court stated that fraudulent conveyances must be proven by a preponderance of the evidence.[88] Fraud must exist at the time of the conveyance, a creditor must be

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[84] Fla. Stat. § 77.0305 (2017).

[85] 169 So. 617, 618 (Fla. 1936).

[86] *Id.*

[87] 149 So. 345, 348 (Fla. 1933).

[88] 450 So. 2d 867, 872 (Fla. 5th DCA 1984), *cert. quest. aff'd* 475 So. 2d 227 (Fla. 1985), *overruled on other grounds by Exceletech, Inc. v. Williams*, 579 So. 2d 850 (Fla. 5th DCA 1991), *aff'd* 597 So. 2d 275 (Fla. 1992), *overruled on other grounds by Bleidt v. Lobato*, 664 So. 2d 1074 (Fla. 5th DCA 1995).

defrauded and there must be a conveyance of non-exempt property.[89] There are certain badges of fraud that alone are insufficient to prove a fraudulent conveyance but, when taken together, are sufficient. These include: (1) the debtor's insolvency or indebtedness; (2) the lack of or inadequate consideration; (3) the debtor's retention of possession or control of the property; (4) a relation between the debtor and the transferee; (5) the threat of litigation at the time of the transfer; or (6) the transfer of the debtor's entire debt.[90]

In addition to the foregoing common law, several statutory tools are available to attack a fraudulent transfer, including setting aside the transfer and levying upon the assets transferred or other substitute property of the transferee. The following are the operable fraudulent transfer statutes available to any creditor.

56.29. Proceedings supplementary

(6)(a) When, within 1 year before the service of process on him or her, defendant has had title to, or paid the purchase price of, any personal property to which the defendant's spouse, any relative, or any person on confidential terms with defendant claims title and right of possession at the time of examination, the defendant has the burden of proof to establish that such transfer or gift from him or her was not made to delay, hinder, or defraud creditors.

(b) When any gift, transfer, assignment or other conveyance of personal property has been made or contrived by defendant to delay, hinder or defraud creditors, the court shall order the gift, transfer, assignment or other conveyance to be void and direct the sheriff to take the property to satisfy the execution. This does not authorize seizure of property exempted from levy and sale under execution or property which has passed to a bona fide purchaser for value and without notice. Any person aggrieved by the levy may proceed under ss. 56.16-56.20.[91]

726.105. Transfers fraudulent as to present and future creditors

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

1. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

2. Intended to incur, or believed or reasonably should have believed he or she would incur debts beyond his ability to pay as they became due.

[89] *Id.* at 873.

[90] *Id.* at 873-74.

[91] Fla. Stat. § 56.29(6)(b) (2017).

(2) In determining actual intent under paragraph (1)(a), consideration may be given, among other factors, to whether:

(a) The transfer or obligation was to an insider.

(b) The debtor retained possession or control of the property transferred after the transfer.

(c) The transfer or obligation was disclosed or concealed.

(d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(e) The transfer was of substantially all the debtor's assets.

(f) The debtor absconded.

(g) The debtor removed or concealed assets.

(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred.

(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.[92]

726.106. Transfers fraudulent as to present creditors

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(2) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.[93]

In addition to setting aside a fraudulent transfer, a corporation's shareholders may be liable for the corporation's debts to the extent that they received a distribution of the corporation's assets at a time when they knew or should have known that the corporation had outstanding debts. Florida law holds that, in such

[92] Fla. Stat. § 726.105 (2017).

[93] Fla. Stat. § 726.106 (2017).

an event, the shareholders are personally liable since they are deemed to have received the corporate assets as trustees for the benefit of the corporation's creditors.

"[T]he properties of a corporation are to be deemed a trust fund for the payment of the debts of the corporation, so that the creditors have a lien upon it or right of priority out of it in preference to any shareholder of the corporation."[94] A corporation is required to maintain a sufficient amount of its funds to pay the claims of its creditors, including its contingent creditors.[95] Similarly, Florida Statutes will hold the directors of a corporation personally liable for any distributions to shareholders that the directors affirmatively authorize in violation of Florida law. Florida Statutes typically prohibit the declaration of distributions to shareholders where the corporation is insolvent.

Chapter 607, *Florida Statutes*, provides that the directors of a corporation may be personally liable for distributions if the effect of which precludes the corporation's ability to pay its debts as they become due. "No distribution may be made, ***if after giving it effect***: (a) The corporation would not be able to pay its debts ***as they become due*** in the usual course of business; or (b) The corporation's total assets would be less than the sum of its total liabilities. . . ."[96] Any director who votes for or assents to a distribution made in violation of Florida Statutes is personally liable for the amount of the distribution that exceeds what could have been distributed in accordance with Florida law.[97]

G. Piercing corporate veil.

One of the advantages of doing business though a corporation is that its shareholders are generally not liable for the corporation's debts. Nevertheless, this corporate shield or veil may be pierced under limited circumstances.

Florida courts will hold a corporation's shareholders liable for the corporation's debts where it is shown that the corporation was organized or used to mislead its creditors, to perpetrate a fraud on the corporation's creditors or the corporation has been used for some illegal purpose.[98] The mere ownership of a corporation by one or a handful of shareholders is an insufficient reason to pierce the corporate veil.[99]

"A critical issue in the determination of whether the corporate veil will be pierced for the imposition of personal liability is whether the corporate entity was organized or operated for an improper or fraudulent purpose."[100] Unless there is a showing that a corporation was formed or employed for an unlawful or

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[94] *Beach v. Williamson*, 83 So. 860, 863 (Fla. 1919); s*ee also U. S. Fire Ins. Co. v. Morejon*, 338 So. 2d 223, 224 (Fla. 3d DCA 1976), *cert. den.* 345 So. 2d 426 (Fla. 1977).

[95] *Beach*, 83 So. at 863; s*ee also Tomorrow Invs., Inc. v. Friedman*, 510 So. 2d 1095, 1097 (Fla. 3d DCA 1987); *Diamond Int'l Corp. v. SJH Enters., Inc.,* 487 So. 2d 1089, 1091 (Fla. 5th DCA 1986).

[96] Fla. Stat. § 607.06401(3) (2017) (emphasis added).

[97] Fla. Stat. § 607.0834(1) (2017).

[98] *See, e.g., Gershuny v. Martin McFall Messenger Anesthesia Prof'l Assoc.*, 539 So. 2d 1131, 1133 (Fla. 1989); *Gen. Builders Corp. of Ft. Lauderdale, Inc. v. Sisk*, 461 So. 2d 104, 104 (Fla. 1984); *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114, 1121 (Fla. 1984); *Aztec Motel, Inc. v. State*, 251 So. 2d 849, 852 (Fla. 1971); *McFadden Ford, Inc. v. Mancuso*, 766 So.2d 241, 242 (Fla. 4th DCA 2000).

[99] *Advertects, Inc. v. Sawyer Indus*., 84 So. 2d 21, 23 (Fla.1955) (holding that "[t]he mere fact that one or two individuals own and control the stock structure of a corporation does not lead inevitably to the conclusion that the corporate entity is a fraud or that it is necessarily the alter ego of its stockholders to the extent that the debts of the corporation should be imposed upon them personally").

[100] *Kanov v. Bitz*, 660 So. 2d 1165, 1166 (Fla. 3d DCA 1995).

improper purpose, such as subterfuge to mislead or defraud creditors, to hide assets, to evade the requirements of a statute or some betrayal of trust, the corporate veil cannot be pierced.[101]

The rule of law to hold a parent corporation liable for the debts of its subsidiary is similar to the above rules. "[T]o pierce the corporate veil under Florida law, it must be shown not only that the wholly-owned subsidiary is a mere instrumentality of the parent corporation but also that the subsidiary was organized or used by the parent to mislead creditors or to perpetrate a fraud upon them."[102]

VIII. Tenant's Remedies.

In the event of a breach of the lease by the Landlord, the Tenant will seek to specifically enforce the lease against the Landlord. The Landlord's default typically involves a lease provision that restricts the Landlord's right to lease or sell the property at issue, such as a restrictive covenant that prohibits the lease or sale to a particular type of business. Enforcement would thus be through the issuance of an injunction. To obtain a permanent or temporary injunction enforcing a restrictive covenant on the use of real property, it is the claimant's burden to adequately ***prove each*** of the following essential elements: (a) the existence or likelihood of irreparable harm; (b) the unavailability of an adequate remedy at law; (c) a clear legal right and likelihood of success on the merits; and (d) the injunction is in the public interest.[103] The claim has the burden of proving each of these elements with ***competent, admissible evidence***. *See Eastern Fed. Corp. v. State Office Supply Co., Inc.*, 646 So. 2d 737, 741 (Fla. 1st DCA 1994); *St. Johns Inv. Mgmt. Co. v. Albaneze*, 22 So. 3d 728, 731 (Fla. 1st DCA 2009).

Florida law appears to be in conflict whether irreparable harm must actually be proven to enforce a restriction on the use of real property. At least one court has held that such harm is presumed. *See Autozone Stores, Inc. v. Northeast Plaza Venture, LLC.*, 934 So. 2d 670 (Fla. 2d DCA 2006). However, in *Liza Danielle, Inc. v. Jamko, Inc.*, 408 So. 2d 735, 738 (Fla. 3d DCA 1982), irreparable harm was required to be proven. *Id.* In that case, a plaintiff-tenant sued its landlord and a co-tenant for violation of an exclusive use clause contained in the plaintiff-tenant's lease. 408 So. 2d at 736. The clause provided that the plaintiff-tenant was to be the sole shoe store in the retail center. *Id*. The plaintiff-tenant claimed that the landlord's lease to the co-tenant violated the exclusive use clause because the co-tenant was operating a shoe store. *Id*. After an evidentiary hearing, the trial court found that all elements for the issuance of an injunction had been proven. *Id*. The appellate court reversed the injunction because there was no proof of any irreparable harm or an inadequate remedy at law. *Id*. at 738. In fact, the appellate court noted that the only evidence of harm was in the form of the plaintiff-tenant's lost profits, which was held not to constitute irreparable harm. *Id*. at 739.

Restrictive covenants which prohibit lawful uses of real property are ***not favored*** under Florida law. *Wilson v. Rex Quality Corp*., 839 So. 2d 928, 930 (Fla. 2d DCA 2003); *see also Moore v. Stevens*, 106 So.

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[101] *See Aztec Motel*, 251 So. 2d at 852 (holding that "courts will look through the screen of corporate entity to the individuals who compose it in cases in which corporation is a mere device or sham to accomplish some ulterior purpose, or is a mere instrumentality or agent of another corporation or individual owning all or most of its stock, or where the purpose is to evade some statute or to accomplish some fraud or illegal purpose.") (citing *Meyer v. Eastwood-Smith Co.*, 164 So. 684 (1935)); *see also Munder v. Circle One Condo., Inc.*, 596 So. 2d 144, 145 (Fla. 4th DCA 1992) (finding that directors, officers and stockholders may lose their insulation from liability for corporate acts if they engage in fraud, self-dealing, unjust enrichment or betrayal of trust).

[102] *Ocala Breeders' Sales Co. v. Hialeah, Inc.,* 735 So. 2d 542, 543 (Fla. 3d DCA 1999); *USP Real Estate Inv. Trust v. Discount Auto Parts, Inc.,* 570 So. 2d 386, 390 (Fla. 1st DCA 1990).

103 *See Reserve at Wedgefield Homeowners' v. Dixon*, 948 So. 2d 65, 67 (Fla. 5th DCA 2007); *State Agency for Healthcare Admin. v. Cont'l Car Servs., Inc.,* 650 So. 2d 173, 175 (Fla. 2d DCA 1995).

901, 903 (Fla. 1925). As a result, restrictive covenants which contain ambiguities are to be ***strictly construed*** in favor of free and unrestricted use of one's real property. *Moore*, 106 So. at 903.

If an ambiguity or doubt exists about the meaning of words or the intent of the parties, the ambiguity or doubt must be resolved against the person claiming the right to enforce the covenants. *Id*. at 904; *see also McInerney v. Klovstad*, 935 So. 2d 529, 531 (Fla. 5th DCA 2006); *Palma v. Townhomes of Oriole Ass'n, Inc.,* 610 So. 2d 112, 113-14 (Fla. 4th DCA 1992) (holding that, where a restrictive covenant could be interpreted in at least two (2) different ways, it was too ambiguous to be enforced); *James v. Smith*, 537 So. 2d 1074, 1076-77 (Fla. 5th DCA 1989) (holding that an ambiguous deed restriction, which prevented lot owners from keeping any animals on property other than "domestic pets," would be construed in favor of the lot owner to permit him to keep two ponies on the property for recreational purpose).

A "constructive eviction" is an act which, although not amounting to an actual eviction, is done with the intention and has the effect of interfering with the tenant's beneficial enjoyment of the leased premises. *Hankins v. Smith*, 138 So.494, 495-96 (Fla. 1931) (citing 36 C. J. 256, § 980); *Berwick Corp. v. Kleinginna Inv. Corp.,* 143 So.2d 684, 687 (Fla. 3d DCA 1962). Such an eviction is "an ***intentional*** act or omission of the landlord, ***permanently depriving the tenant*** without his consent of ***the use and beneficial enjoyment*** of the demised premises, or any substantial part thereof, so that the tenant abandons the premises." *Berwick Corp.*, 143 So.2d at 687 (emphasis added) (quoting 3 *Thompson on Real Property* § 1132, p. 459). The *Berwick* court interpreted "the meaning of 'permanent' as used in this definition to be that the ***deprivation of use may not be of short duration***." *Id.* (emphasis added). "[T]o constitute a constructive eviction there must be some substantial interference which is ***injurious*** to the tenant's beneficial use and enjoyment of the premises." *Kaplan v. McCabe*, 532 So.2d 1354, 1357 (Fla. 5th DCA 1988) (quoting 14 A.L.R.2d 1450, 1451 (1950)) (emphasis added).

A constructive eviction must also be wrongful or unlawful to be actionable. *Sentry Water Sys., Inc. v. ADCA Corp.*, 355 So.2d 1255, 1257 (Fla. 2d DCA 1978). In contrast, an actionable constructive eviction does not arise from an attempt by the landlord to hold the tenant to the terms of the lease. *Id.* (citing 52 C.J.S. Landlord & Tenant §§ 445, 447 (1968)) (emphasis added). A tenant who alleges constructive eviction must give "timely notice" to the landlord of the objectionable act ***and*** "demand rectification." *Richards v. Dodge*, 150 So.2d 477, 484 (Fla. 2d DCA 1963). Where the tenant fails to do so, there is no constructive eviction as a matter of law. *Kaplan*, 532 So.2d at 1357. *See also Perkins v. National Credit Sys., Inc.*, No. 8:18-CV-806-T-26CPT, 2018 WL 3931860, at *2 (M.D. Fla. 2018).

A hearing to determine contested rent to be paid into the registry this is required under section 83.232, Florida Statutes, which provides in pertinent part:

> (1) In an action by the landlord which includes a claim for possession of real property, **the tenant shall pay 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**. . . .
>
> (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.

§ 83.232, Fla. Stat. (emphasis added). This statute has been construed to mean "that, if you do not claim you have paid the rent already, you must deposit rent into the court registry in order to preserve your right to remain on the premises." *Premici v. United Growth Properties, L.P.*, 648 So. 2d 1241 (Fla. 5th DCA 1995).

This "summary procedure" set forth in section 83.232 envisions "an expedited process to determine the right to possession promptly without the necessity of deciding all other issues between the parties." *Camena Investments & Prop. Mgmt. Corp. v. Cross*, 791 So. 2d 595, 596–97 (Fla. 3d DCA 2001) (citing *Premici*, 648 So. 2d at 1243). In *Camena*, the court explained:

> While the tenant may assert all equitable defenses in a landlord/tenant dispute, there is no obligation to do so in the summary procedure action. Just as the landlord does not have to assert all its claims in the action to remove the tenant, the tenant does not have to assert all its defenses. The tenant may await the landlord's action for damages to assert any monetary claims by way of affirmative defenses or counterclaims.

Camena Investments and Property Management Corp., 791 So. 2d at 597. *See also Hallandale Plaza, LLC v. New Tropical Car Wash, LLC*, 335 So. 3d 712 (Fla. 4th DCA 2022) ("Upon hearing the Tenant's motion to determine rent, the trial court was to make a preliminary determination as to the factual and legal issues concerning what, if any, additional rent was due to the court registry for the duration of the action and nothing more."); *Bezl Ltd., LLC v. Raymond Office Plaza, LLC*, 313 So. 3d 632 (Fla. 4th DCA 2021) (recognizing that "Florida courts consistently have held that trial courts have no discretion in entering an immediate default for possession" where a tenant fails to pay the rent into the court registry pursuant to court order and that "[t]he trial court may not consider the reasons why the deposit was not timely made") (citation omitted); *Muvico Entm't, L.L.C. v. Pointe Orlando Dev. Co.*, 755 So. 2d 194 (Fla. 5th DCA 2000) (explaining that section 83.232(2), Florida Statutes "specifically provides that if the tenant contests the amount of money to be paid into the court registry, the court is limited to factual and legal issues concerning what constitutes rent under the lease agreement and whether the tenant is due any credits for rent that has been paid").

If, however, a lease specifically provides for a reduction in rent in certain specified instances, then at the hearing to determine "what properly constitutes rent" under section 83.232, the trial court is "required to make at least a preliminary determination of the reduction, if any, to which the tenant [is] entitled regarding the deposit into the court registry required by section 83.232." *Rowe v. Macaw Holdings I, LLC*, 248 So. 3d 1178 (Fla. 4th DCA 2018).

In *Rowe*, the lease contained a provision governing partial destruction of the premises, and provided for a reduction in fixed rent that was proportionate to the extent to which operations to repair the premises interfered with the operation of the business. *Id.* at 1179. Roof problems materialized early in the lease, and the tenant, who operated a gym, said that water damage occurred and debris from roof repairs damaged his

gym equipment. *Id.* The tenant made partial payments of rent. The landlord, however, filed a complaint for eviction and damages for nonpayment of rent. The tenant made multiple requests for a hearing to determine the amount of money he was required to post into the court registry pursuant to section 83.232. The circuit court denied the tenant's requests and ordered the tenant to post the monthly "fixed rent" set forth in the lease, less the amounts he had paid and other credits to which the parties agreed. The tenant failed to make the required payment and the court entered a default final judgment for possession. On appeal, the Fourth District Court of Appeal determined the trial court "erred in failing to hold a section 83.232(2) hearing" to determine "[w]hat properly constitutes rent under the provisions of the lease." *Id.* at 1180. The Fourth District Court found:

> The lease in this case defined "fixed rent" in section 3; concerning a "partial destruction of the premises," section 11 states that "Fixed Rent will be reduced proportionately to the extent to which the repair operations interfere with the business conducted on the Premises by Lessee." The lease thus describes the credit to which a tenant is entitled for partial destruction of the premises as a reduction to "Fixed Rent."

Id. at 1180. The court concluded that the case fell under section 83.232(2)(b), which contemplates a hearing on "[w]hat properly constitutes rent" under a lease, and that "[t]he trial court was required to make at least a preliminary determination of the reduction, if any, to which the tenant was entitled regarding the deposit into the court registry required by section 83.232." *Id.*

The court in *Rowe* opined that the case was similar to *Double Park, LLC v. Kaine Parking 125, LLC,* 168 So. 3d 278 (Fla. 3d DCA 2015). *Double Park* also involved a factual dispute concerning the amount of rent due under the provisions of a lease. The court in *Rowe* opined that in cases such as *Rowe* and *Double Park* where there is a lease provision allowing for adjustments to "rent" set forth in a lease and there is a dispute as to the amount of such adjustments that should be made, the court must hold an evidentiary hearing before entering an order requiring the posting of the adjustments into the court registry. *Id*. at 1180.