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Issues presented

Does eviction of a non-residential tenant (a) constitute termination of a lease agreement, and (b) does it preclude the landlord from accelerating rent payments pursuant to the terms of the lease agreement.

Short answer

Eviction does not (a) terminate a commercial lease agreement under Florida law, or (b) preclude the landlord from exercising the option to accelerate rent payments under the terms of the lease in the absence of any relevant modifying provisions in the lease agreement, or evidence of landlord's retaking possession for the landlord's own use.

Discussion

It is well-settled in Florida that after a breach by the tenant, the landlord has three options: (1) terminate the lease and retake possession of the premises on his own account; (2) retake possession of the premises on account of the tenant; or (3) do nothing and hold the tenant liable for each rent installment as it becomes due. *E.g., Williams v. Aeroland Oil Co.*, 20 So. 2d 346, 347-48 (Fla. 1944); *In re 2408 W. Kennedy, LLC*, 512 B.R. 708, 712-14 (Bankr. M.D. Fla. 2014) (applying Florida law). By evicting the tenant the landlord selects options (1) or (2). The only difference between these two alternatives is the landlord's intent to take possession on

landlord's own account or on account of the tenant. *In re 2408 W. Kennedy, LLC*, 512 B.R. at 712-14.

When the landlord takes control of the leased premises on its own account, the lease is terminated along with the tenant's obligation to pay future rent. *Id.*; *Geiger Mut. Agency, Inc. v. Wright*, 233 So. 2d 444, 447 (Fla. 4th DCA 1970) ("ejectment" of the tenant terminated the lease when the landlord resumed exclusive possession of the premises "for his own use"). In these circumstances, acceleration of rent payments under the lease agreement[1] is not available because it would result in the landlord recovering "a double remedy." *Geiger Mut. Agency*, 233 So. 2d at 447.

In contrast, when the landlord takes possession on account of the tenant, the lease agreement does not terminate. *In re 2408 W. Kennedy, LLC*, 512 B.R. at 712-14; *see also Kanter v. Safran*, 68 So. 2d, 553, 557-58 (Fla. 1953) (upon relinquishment by the lessee, the lessor may accept surrender of the premises, reenter, and relet on account of the lessee without terminating the lease agreement).

1. Eviction

Eviction does not terminate the lease in the absence of the landlord's affirmative act of termination. *In re 2408 W. Kennedy, LLC*, 512 B.R. at 712-14; *see also In re PAVCO Enterprises, Inc.*, 172 B.R. 114, 117 (Bankr. M.D. Fla. 1994) ("Considering the three options of a landlord, it is clear that regaining the premises is not tantamount to termination of the lease"); *In re Florida Lifestyle Apparel, Inc.*, 221 B.R. 897, 899 (Bankr. M.D. Fla. 1997) (applying Florida law and holding that where the lease agreement allowed the landlord to retake possession

[1] The general rule is that acceleration is only available when there a lease provision providing for it. *Nat'l Adver. Co. v. Main St. Shopping Ctr.*, 539 So. 2d 594, 595 (Fla. 2d DCA 1989) (citing *Williams v. Aeroland Oil Co.*, 20 So. 2d 346, 347-48 (Fla. 1944)).

of the leased premises without terminating the lease, and where the landlord expressed no intention to terminate, the lease agreement survived); *In re Spice Modern Steakhouse, Inc.*, 6:11-BK-15109-ABB, 2011 WL 5563545, at *2 (Bankr. M.D. Fla. 2011) (same). For example, in *2408 W. Kennedy*, the bankruptcy court held that issuance of the final judgment for possession and a writ of possession did not terminate the lease. 512 B.R. at 713.

It is also true that the "terms of a written commercial lease are controlling in determining whether a termination has occurred and those terms may not be rewritten by the Courts." *In re Spice Modern Steakhouse, Inc.*, 2011 WL 5563545, at *2 (citing *Rodeway Inns of America v. Alpaugh*, 390 So.2d 370, 372 (Fla. 2d DCA 1980)). Accordingly, the courts are likely to consider the terms of the lease agreement, and are likely to enforce a provision specifying that the landlord's entry and taking possession of the premises after the tenant's default does not terminate the lease. *See id.*; *Vareka Investments, N.V. v. Am. Inv. Properties, Inc.*, 724 F.2d 907, 912 (11th Cir. 1984) (the court properly accepted the parties' stipulation that the lease did not terminate when the lease agreement provided that upon default the landlord could retake possession and re-let the premises on account of the tenant).

2. Acceleration

There is conflicting authority as to whether regaining possession terminates the landlord's ability to accelerate rent payments under the lease agreement. In *Coast Federal Sav. & Loan v. DeLoach*, the Second District Court of Appeal stated that "[b]y retaking possession either for his own account or for the account of the lessee, a lessor loses the right to recover the full amount of remaining rental due on the basis of the acceleration clause." 362 So.2d 982, 984 (Fla. 2d DCA 1978). The court cited *Geiger Mutual Agency* and *Jimmy Hall's Morningside, Inc. v. Blackburn & Peck Enterprises, Inc.*, 235 So. 2d 344 (Fla. 2d DCA 1970) in support of this

proposition. *Geiger* and *Jimmy Hall's*, however, do not support the entire aforementioned statement.

While the Fourth District Court of Appeal held in *Geiger* that the landlord could not accelerate rent payments, the court also said that the landlord took possession on his own account in that case. 233 So. 2d at 447. In *Jimmy Hall's*, a previous Second District Court of Appeal panel actually allowed acceleration of the rent payments after the lessor took possession of the premises on account of the lessee, as long as the rent collected for reletting was applied to the amount due from the original lease. 235 So. 2d at 346. Further, the court in *Coast Federal Savings and Loan Association* did not decide whether acceleration was appropriate, but remanded the case for a determination whether the lessor actually retook possession of the premises. 362 So.2d at 985; *see also Grove Restaurant and Bar, Inc. v. Razook*, 571 So.2d 596 at 597-98 (Fla. 2d DCA 1990) (citing *Coast Federal* for the aforementioned proposition and remanding for a factual finding of whether a constructive eviction occurred). Moreover, the statement in *Coast Federal* that retaking possession on account of the tenant precludes acceleration is inconsistent with the Florida Supreme Court's conclusion that the lease agreement did not terminate upon acceptance of the surrender of the premises if the landlord took possession on account of the tenant, and that the landlord may collect the difference between the amount received from reletting and the amount stipulated in the original lease for the remainder of the term. *Kanter v. Safran*, 68 So. 2d, 553, 557-62 (Fla. 1953). While *Kanter* did not include a discussion of acceleration, and stated that the landlord may collect the difference at the end of the leasing period, if the lease agreement is not terminated, the acceleration clause should remain enforceable. *See id.*; *Jimmy Hall's Morningside*, 235 So.2d at 346.

Kanter, *Geiger*, and *Jimmy Hall's* stand for the proposition that the landlord cannot recover the rent payments from the defaulting tenant, acquire possession, relet the premises, and keep the rent payments from the original and the new tenants. *Kanter*, 68 So. 2d at 557; *Geiger Mut. Agency*, 233 So. 2d at 447; *Jimmy Hall's Morningside*, 235 So. 2d at 346. Accordingly, when the landlord takes possession on account of the tenant, it is proper for the court to allow acceleration of the rent payments and enter judgment for the landlord as long as the court reserves jurisdiction for an accounting of the rents received from reletting the premises to a third party, if any such rents are collected. *Jimmy Hall's Morningside*, 235 So. 2d at 345-46; *Quintero-Chadid Corp. v. Gersten*, 582 So.2d 685, 689 (Fla. 3d DCA 1991); *Horizon Med. Group, P.A. v. City Ctr. of Charlotte Cnty., Ltd.*, 779 So. 2d 545, 546 (Fla. 2d DCA 2001); *Bucky's Barbeque of Fort Lauderdale, LLC v. Millennium Plaza Acquisition, LLC*, 67 So. 3d 1207, 1210 (Fla. 4th DCA 2011); *Siboni, Hamer & Buchanan, P.A. v. N.W. Third St. P'ship, Inc.*, 84 So. 3d 477 (Fla. 5th DCA 2012); s*ee generally CB Institutional Fund VIII v. Gemballa U.S.A., Inc.*, 566 So. 2d 896, 896 (Fla. 4th DCA 1990) (distinguishing *Geiger* and finding that when the evidence of landlord taking possession on account of the tenant was not refuted, acceleration was appropriate); *Blimpie Capital Venture, Inc. v. Palms Plaza Partners, Ltd.*, 636 So. 2d 838, 840-41 (Fla. 2d DCA 1994) (the fact that the landlord accelerated the rent, took possession, and relet the premises would not make the final judgment against the tenant improper).

3. Evidence the courts consider in determining whether the landlord took possession for its own use or on account of the tenant

The landlord's actual use of the premises determines the remedies, and the nature of the repossession is usually a question of fact. *Bucky's Barbeque of Fort Lauderdale, LLC*, 67 So. 3d at 1209. The courts consider both statements and conduct of the parties in determining whether

the landlord took possession of the premises on account of the landlord or the tenant, and whether the lease was terminated. The following cases illustrate this point. In *Jimmy Hall's Morningside, Inc.*, the landlord wrote to the tenants that it was retaking possession and it would credit the tenants with the rent collected subsequently and hold the tenants responsible for the deficiency. 235 So. 2d at 345. Thereafter, the landlord accelerated the rent payments. *Id.* The Second District Court of Appeal held that the trial court erred in issuing the judgment in favor of the landlord for the full sum of accelerated payments without providing for an accounting to determine any amounts received from reletting the premises. *Id.* In *CB Institutional Fund VIII*, the landlord provided an affidavit stating that it took possession on account of the tenant in support of its motion for summary judgment. 566 So. 2d at 896. Because the affidavit was not rebutted, acceleration of the rent payments under the lease agreement was appropriate. *Id.* In *2408 W. Kennedy, LLC*, the court found that the landlord's letter purporting to terminate the lease due to a breach of a condition did not terminate the lease because the tenant provided persuasive evidence that the condition had not been breached. 512 B.R. at 715. It appears that if the condition was indeed breached, the landlord's letter would have been sufficient to terminate the lease. *See id.*

In *Kanter v. Safran*, the Florida Supreme Court found that the lessee's written relinquishment of possession of the motel and the lessors' written refusal and notice that if the lessee's conduct necessitated retaking possession, such retaking would be on the lessee's account was an express surrender and that the lessor took possession of the premises on account of the lessee. 68 So. 2d, 553, 555, 559 (Fla. 1953). Furthermore, the lessor's repairs were not inconsistent with the intention to relet on account of the tenant. *Id.* at 560-61. In *Hyman v. Cohen*, the Florida Supreme Court held that the landlords terminated the lease and took

possession of the hotel on their own account when the tenant turned over possession following the notice to pay rent or move out, the landlords rented the premises to a corporation they formed for that purpose, and never advised the tenant that they were doing so on the account of the tenant. 73 So.2d 393, 396-97 (Fla. 1954). In *Wagner v. Rice*, the Florida Supreme Court construed the landlord's action for double the rent available to a landlord "at the end of [the tenant's] lease," as landlord's termination of the lease on account of the landlord. *See* 97 So.2d 267, 269-70 (Fla. 1957). The court held that the landlord was not entitled to recover double rent, but that the lessee owed the rent for a year because the agreement provided for annual lease payments, and the landlord terminated the lease three months into the annual period, or three months after the rent payment was due. *Id.* at 271. Lastly, "the exercise of the acceleration clause does not terminate the lease." *Quintero-Chadid Corp. v. Gersten*, 582 So.2d 685, 689 (Fla. 3d DCA 1991).

Accordingly, in the absence of a lease provision to the contrary, landlord's retaking possession of the premises by itself will not terminate the lease and will not preclude acceleration of the rent payments under the lease agreement. Landlord's intent to take possession on account of the landlord must be established with the evidence of a landlord's statement or conduct for the lease to be considered terminated and for the acceleration to be unavailable.