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Landlord News

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HEY, YOU'RE NOT MY LANDLORD - PROPER NAMES IN EVICTIONS AND LITIGATION

When you first become a firm client, we ask you who should be the plaintiff in your eviction cases. What is the name of the company that is evicting the resident? You have only two choices. Eviction suits can name the management company as plaintiff, or the owner as plaintiff.



Because we have represented many clients for years, the name issue is frequently not given much thought until there is a problem. For the most part, problems are few and far between. In those rare circumstances when a problem does arise, most name issues are technical problems and can be readily addressed even after an eviction case

has been filed. However, all name related issues can be avoided by proper evaluation before an issue arises, and by giving us proper name instructions.

You can't decide a name in a vacuum. You must review both your management agreement and your lease. For example, because some owners want to remain anonymous or other reasons, the management agreement might require you to file all lawsuits in the name of the management company. Conversely, if you want to file in the name of your owner, your management agreement should give you the specific right to bring eviction actions and other litigation as agent in the name of the owner. Regardless of the name you file eviction cases under, the litigation name issue should be clearly and specifically addressed in management agreements with owners.

CONTINUED ON PAGE 2

LEGISLATIVE ACTIONS HAVE NEGATIVE IMPACT ON RENTAL INDUSTRY

The multi-family housing industry has faced many challenges during the 2010 legislative session in Colorado. In addition to HB 1017 which deals with the issue of 'Rent Control' we now have front and center, what had been a settled issue only 17 months ago, SB 185 a bill to amend and change the Warranty of Habitability Law. This bill removes key components that were negotiated to achieve a balanced policy for all parties – landlords and tenants.

Some of the objectives of this bill are to remove the requirement that a tenant must provide written notice to a landlord in the case of a breach; expand the definition of a violation of the Warranty of Habitability; and add language that provides for treble damages.



The requirement for written notice is a fundamental protection for both tenants and property owners and provides documentation to substantiate that a notice was given and received, eliminating 'yes I did' 'no you didn't' scenarios. If a warranty of habitability case goes to court a written notice clearly defines what and when and permits the court to focus on the primary issue of determining whether a breach of the warranty of habitability occurred and how the breach should be cured. A written notice creates a fixed timeline for a property owner and tenant to manage a problem. Without written documentation the timetable for 'fixing' a problem can depend on what the parties claimed to have said or remember about when it was said. The requirement for a written notice does not limit any of the number of remedies available to tenants. In fact, the Colorado warranty of habitability law that was passed in 2008 provides more tenant remedies than most states.

CONTINUED ON PAGE 4

HEY, YOU'RE NOT MY LANDLORD - PROPER NAMES IN EVICTIONS AND LITIGATION

CONTINUED FROM PAGE 1

Similarly, leases should be reviewed to make sure that the lease language is consistent and supports the name you use to file your eviction cases. If the lease names the owner as landlord, you could experience problems if you file eviction cases in the management company's name. Because the management company is not the landlord, the resident may contend in court that the resident does not have a rental relationship with the management company. If the resident's lease lists the owner as landlord and you file under the management company, your case is potentially vulnerable to dismissal. Similarly, if the lease lists the management company as landlord and you file your evictions in the name of the owner, your case would also be vulnerable to a motion to dismiss.



When the wrong parties to a lawsuit are named, the resident may base a motion to dismiss on the real party in interest doctrine. Lawsuits may only be brought by the real party in interest, or parties that have legal standing to assert the rights at issue. On contracts, this generally means parties to the contract. In landlord tenant cases based on a lease, generally this means only the landlord or the tenant listed in the lease. Regardless of any lease language, the management company is always the owner's agent regardless of whether specifically addressed in a lease.

Generally, an agent (the management company) has all of the rights that an owner (the principal) has under a lease. For this reason, a resident's motion to dismiss for failure to name the real party, or for lack of standing will always be defeated upon establishing the management company is a real party in interest, or has proper standing to bring the eviction. This is accomplished by introducing the management contract to establish both the agency relationship, and the specific delegation of authority by the owner (the principal) to the agent (the management company) to initiate and maintain litigation, including eviction actions and suits to collect rent.

Nobody wants to spend the extra time and effort responding to a motion to dismiss based on allegedly naming the wrong parties. You should and can avoid the issue altogether by making sure that your eviction cases are filed under your preferred name and the name is legally supportable. Whether you want to file in owner's name or in your management company's name, you can further clarify the issue through the use of appropriate lease language. For example, even if the owner is named in the lease, your lease could state that the owner of the property

has designated you as its general agent and granted to you the authority to manage and administer the premises and to enter into, administer, and enforce provisions of the any leases. Resident acknowledges that you, or your successor as appointed by owner has legal standing and is a real party in interest in to any judicial action or proceeding to enforce the lease.

You have evaluated the situation. The management agreement and lease appear to properly address the issue. Is this the end of your potential problems with name issues? No. You might still have a non-existent owner issue. Unless, you have made it error proof, leasing agents, especially new ones, may still put the wrong name for the owner (the landlord) into a lease. For example, you're managing ABC Apartments. ABC Apartments is owned by ABC Apartment Holding Company IV, LLC. Instead of inserting, the correct legal name into the lease, onsite staff inserts the community name into the lease. In fairness to all leasing agents, this is the intuitive action, and in many instances the leasing agent may not even know the name of the legal entity that holds title to the property. Further, the resident won't say anything because this is also the name the resident expects. After all, the resident is renting an apartment at ABC Apartments.

While it may sound far-fetched, we see this mistake made on lease forms regularly. The reason it is not a significant problem is because residents rarely, if ever, make the argument. However, unlike motions to dismiss for lack of standing, naming a wrong entity as owner (Landlord) that doesn't exist (ABC Apartments) cannot be defeated by the introduction of relevant evidence. The non-existent entity argument is always fatal to an eviction case. If a resident argues that company evicting him doesn't exist and it doesn't, you will have to start your eviction over because only real legal entities may bring and maintain legal actions in Colorado courts.



This brings us to the registration issue. Assuming an eviction case is brought by a legal entity that actually exists such as a corporation, limited partnership, or LLC, the company must also be legally registered and licensed to do business in Colorado. Many multi-family communities are owned by out-of-state legal entities. Non-Colorado companies are known as foreign entities. A foreign entity that has not registered to do business in Colorado has no right to use Colorado courts. Thus, even if the correct ownership entity (ABC Apartments Holding IV, LLC) brings the eviction case, the case will be dismissed if the resident raises this issue

CONTINUED ON PAGE 3

HEY, YOU'RE NOT MY LANDLORD - PROPER NAMES IN EVICTIONS AND LITIGATION

CONTINUED FROM PAGE 2

and the entity is not registered. Are the foreign legal entities that you manage registered to do business in Colorado? One way to make sure is to address this in your management company, i.e. ABC Apartments Holding IV, LLC, represents that it is currently and will continue to be at all times registered to do business in Colorado.

When you check to see if your owners are registered in Colorado, you should also check to see if they have filed a trade name affidavit. For strategic or marketing reasons, many businesses legally operate under a different name. For example, Apple Computer, Inc. was always just known as Apple. Apple was the trade name for Apple Computer, Inc., and was so well known that Apple Computer, Inc. eventually became just Apple, Inc. A trade name is usually a shorter, simpler, and more appealing name for a business to be known to the public. Trade names make a lot of sense in the rental industry because



an apartment community is always publicly known by the community name, and not by legal entity name of the owner. Residents don't look for apartments at the ABC

Apartment Holdings IV, LLC, community. Residents look for apartments at the ABC Apartments. Because filing a trade name affidavit will solve the non-existent owner issue and avoid resident confusion, all apartment community ownership entities should file a trade name affidavit reflecting that the owner does business in the name of the community. Of course, the owner has to be legally registered before it can file a trade name affidavit. Your management agreement should identify all owner trade names, and make the owner responsible for filing any applicable trade names.

If your management agreement and lease support your name decision, the name in which you bring lawsuits is for the most part a preference decision. Some clients prefer filing in the owner's name for two reasons. The management company doesn't want to be known for or otherwise get a reputation for filing hundreds if not thousands of lawsuits against residents. Some management companies argue that filing lawsuits under the name of the owner makes it clear that the owner is responsible for the litigation, including paying to defend the lawsuit and paying any damages. An owner can't ignore a lawsuit when it is a named party. The argument goes that an owner might take the position that a lawsuit is the management company's problem if the owner is not a named party.

However, because most all management agreements require the owner to indemnify the management

company for all costs associated with litigation, even if the owner was not named, the owner most likely could not ignore litigation issues. Thus, bringing lawsuits in the name of the owner, may only serve to reinforce the parties contractual obligations, i.e. lawsuits are the owner's problem. Further, bringing suits in the owner's name won't always keep a management company out of the fray because you have no control over what the resident does. Often, even when you bring a suit in the name of the owner, the resident will name the management company in a counterclaim. After all, the resident doesn't know the owner, the resident knows you. In some cases, the management company will always be named. We have never seen a fair housing discrimination charge that wasn't brought against both the owner and the management company.

To avoid all problems regarding proper names in lawsuits, you should confirm that your lawsuits are being filed under your preferred name, and that your management agreement and your lease supports the name you choose. Regardless of the name being used to file lawsuits, the legal entity bringing the lawsuit has to be registered to do business in Colorado. If you're filing in the name of the owner, make sure that the owner's legal name is being used, and not the name of a non-existent entity. To file lawsuits in the name of the apartment community, the owner must be registered to do business in Colorado, and the owner must have filed a trade name affidavit to do business in the name of the apartment community. Because ownership and apartment community names change over time, you should make a note to reevaluate the name issue upon the change of owners, or community name. When you take over an apartment community, evaluating the name issue should be a standard part of your operational due diligence.

IMPORTANT HTS APRIL DATES

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| APRIL 2nd | DENVER COURTS CLOSED FURLOUGH DAY |
| APRIL 14TH | DOUGLAS COURTS CLOSED |
| April 15th | Non-Monetary Evictions HTS Conference Center 3600 South Yosemite Street Lower Level 8:30 a.m. - Noon |
| April 16th | South Client Lunch Dave & Busters South Colo Blvd, Denver, Colorado 11:30 a.m. - 1:00 p.m. |
| April 23rd | NARPM STATE CONFERENCE Sheraton Denver West Lakewood, Colorado |
| April 28th | Advanced Fair Housing AASC Colorado Springs 2790 N. Academy Blvd Suite 227 |

LEGISLATIVE ACTIONS HAVE NEGATIVE IMPACT ON INDUSTRY CONTINUED FROM PAGE 1

SB 185 broadens the definition of a violation of Warranty of Habitability and will place greater strain on the court system through injunctive relief. This legislation will allow the tenant to obtain injunctive relief in county courts, including small claims courts and will most certainly generate more traffic in our court systems. Lastly, this bill imposes that treble damages should be awarded to the tenant for a violation.

A summary of this legislation can be found on our website htspc.com with contact information for the Senators we need to vote against this bill. It is already out of committee, on the floor and in the final stage of passage. Time is very short if you want to weigh in on this important issue.



NO ONE LIKES PAYING TAXES

Here is a light hearted look at the IRS and tax collection:

How is a mugger different from the Internal Revenue Service? Both take your money, but the mugger doesn't make you fill out forms. --

More than ever before, Americans are suffering from back problems: back taxes, back rent, back auto payments.

Taxation with representation ain't so hot either.

If you are truly serious about preparing your child for the future, don't teach him to subtract - teach him to deduct.



The Internal Revenue Code is about 10 times the size of the Bible - and unlike the Bible, contains no good news. --

The only people I've ever met who would like to pay more taxes are those who aren't making any money.

If the tax laws were too complicated for Einstein to figure out, what hope is there for the rest of us?

