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Memorandum

Re: Accepting Payments During Eviction Process

Date: January 28, 2021

To: Firm Clients

From: Mark Tschetter, Managing Partner

Overview

The eviction process starts with the service of an eviction notice. There are three types of eviction notices:

- 1) Demand for Rent or Possession;
- 2) Demand for Compliance or Possession for lease breaches other than rent (non-monetary compliance demand); and
- 3) Notice to Quit.

Further, there are three types of Notices to Quit:

- a) Notice to Quit for a Repeat Violation;
- b) Notice to Quit for a Substantial Violation (either Statutory or contractual); and
- c) Notice to Quit (also known as a Notice to Vacate or a Notice of Non-Renewal).

The fundamental difference between a Demand and Notice to Quit is the opportunity to comply. For example, Rent Demands demand that the tenant comply (pay the rent) or get out. On the other hand, any form of a Notice to Quit simply demands the tenant to vacate (move out of the rental) with no opportunity to comply.

Previous to 2019 and certainly to COVID, rent cases were based on a 3-Day Demand for Rent or Possession and moved along fairly quickly. However, rent cases now move through the courts much slower both because landlords must serve a 10-Day Demand

for Rent and overall the entire Court process has significantly slowed down since COVID. All eviction cases, not just rent cases, during the COVID era take much longer to process. As a result of the greater time frame, there is a much greater chance that tenants will offer money or attempt to make some sort of payment during the eviction process. Further, due to COVID, many landlords who have no eviction experience are having to file evictions because their tenants are not paying the rent. Accordingly, we wanted to make sure all Tschetter Sulzer clients were aware of the significant negative ramifications of accepting partial rent at any time during the eviction process.

Rent Evictions

Under Colorado Law, it is without question that the landlord's acceptance of any money (payment) after service of a Demand for Rent and at any time during the eviction process waives the landlord's rent to move forward with the case.

In describing waiver, this court has declared that any act done by a landlord with knowledge of an existing right of forfeiture, which recognizes the existence of the lease is a waiver of the right to enforce the forfeiture. An act of the landlord which is frequently relied upon to establish waiver is the acceptance of rent subsequent to knowledge of the breach of the lease by the lessor. The landlord having made his election to accept rent due after violation of the lease, cannot thereafter rely upon the past default as grounds for terminating the lease. Merkowitz v. Mahoney, 121 Colo. 38, 42, 215 P.2d 317, 320 (1949).

Accordingly, if you accept rent at any time during the eviction process, your case will be dismissed and you must start the entire process over by re-serving a new Demand for Rent or Possession. **Important Point** - legally landlords must accept the rent if offered in full by the tenant during the statutory 10-Day demand period.

Non-Monetary Compliance Evictions

Non-Monetary Evictions are based on a 10-Day Demand for Compliance or Possession. Again, the thrust of this demand is stop breaching the lease or get out within 10-Days. For example, stop having loud parties or get out, or stop having an unauthorized occupant or get out. If the tenant has not complied with the provision of the lease they are breaching within 10-Days, the landlord may file an eviction case based on the

demand. Unlike a rent case, Colorado law states that a landlord may accept rent during the pendency of a non-monetary compliance eviction.

The Hogans filed a cross-claim to terminate the lease which they had given initially to Fogel, alleging, Inter alia, that the lease had been breached by a failure to maintain the premises, as required by a maintenance provision in the lease. The trial court concluded that there had been such a breach even though Hilst did make some improvements, and this conclusion is supported by the evidence. Hilst contends, however, that this breach was waived because the Hogans accepted rent payments during the pendency of this action. Contrary to Hilst's contention, when a tenant continues in possession pending a determination of an action brought by the landlord to enforce a forfeiture, the tenant is under an obligation to pay rent and acceptance of these payments does not constitute a waiver of the breach. Fogel v. Hogan, 496 P.2d 322, 324 (Colo. App. 1972)

This distinction from rent cases is only logical. The landlord is not evicting for non-payment of rent but for some other lease violation. If the tenant is fighting a non-monetary breach eviction, the tenant is saying "I did not breach the lease as the landlord claims *and* I want to continue to live in the rented unit. Accordingly, the tenant should pay rent for occupying and the landlord should be allowed to accept the rent. **IMPORTANT CAVEAT** - In our considerable experience, some courts have failed to recognize the clear legal distinction between accepting rent in Rent Evictions versus Non-Monetary Evictions and incorrectly held that accepting rent during the pendency of a non-compliance eviction constitutes a waiver. Clearly, such a ruling is in error of the cited case law. However, once a court erroneously rules, the landlord only has the undesirable option of appealing the case. Accordingly, the safest decision in non-monetary eviction cases is to not accept any payments during the pendency of the case.

Notice to Quit Based Evictions

Notice to Quit for Repeat Violations and Notice to Quit for Substantial Violations

Remember, the essence of a Notice to Quit is that the tenant's right to possession is legally terminated with no right to cure. Accordingly, accepting any money or payment after the expiration of a Notice to Quit (either for a Repeat Violation or for a Substantial

Violation) waives the landlord's right to proceed on that Notice to Quit because it is an act that recognizes the lease after the landlord has told the tenant the lease is over.

Notice to Quit (Notice to Vacate - Notice of Non-Renewal)

The generic Notice to Quit is always served to either terminate a month-to-month tenancy, or to terminate a tenancy at the end of the term. The Notice to Quit tells the tenant that the tenant's right of occupancy is being terminated at the end of a month or at the end of the term. Accordingly, acceptance of any rent or payment after the expiration of this type of Notice to Quit tells the tenant that the landlord is extending the lease, the tenant's right of possession, and waives the landlord's right to evict based on that Notice to Quit. **KEY POINT** - This is probably the most common mistake that we see regarding acceptance of rent during the eviction process that is made by landlords or managers that are not familiar with the eviction process.

However, you are allowed to accept payment for the final month(s) of the term even though you have already served a Notice to Quit. For example, the lease is month-to-month. On January 28th, you serve a Notice to Quit to terminate the tenancy as of February 28th. The tenant is still required to pay February's rent and you are entitled to accept payment if the tenant offers.

The POP Exception

One current exception to accepting rent is the POP program and other rental assistance programs. If applied for and approved, these rental assistance programs require landlords to accept the rent if the program pays the landlord the rent. Obviously, the landlord is then required to dismiss the eviction case for non-payment of rent and waives the right to evict the tenant for non-payment of the rent paid by the rental assistance program.

How to Handle Unwanted Payments

Frequently, tenants deliver or make payments that the landlord doesn't want to accept. For example, the tenant will either drop a payment off or mail it during the eviction process. Upon receipt, a landlord cannot just hold or sit on the payment but must take action to return the payment to the tenant. If the landlord fails to take such action the court will rule that mere retention of the payment after a period of time constitutes an intent to accept the payment (even if the landlord does not deposit the payment). Thus, upon notice of any payment during the eviction process, a landlord must promptly notify the tenant in writing that the landlord is not accepting the payment. How the payment is to be returned depends on the circumstances. Frequently, the payment is a certified check or money order. To avoid these payments being lost or the tenant claiming that

they never received the payment when you mailed or delivered it, we recommend informing the tenant in writing that you are not accepting the payment and to prevent the payment from being lost or stolen the tenant should come to the landlord's office to pick up the payment along with details about how the tenant can retrieve the payment. In short, landlords can't sit on payments and avoid the waiver by stating that they never requested the payment and the tenant just voluntarily delivered the payment.

Conclusion

In Rent Cases, acceptance of any payment, partial or otherwise, is fatal to your case and will require you to start over. The rule is the same for evictions based on any form of notice to quit. Based on the law, landlords should be able to accept payments during evictions based on non-monetary compliance, however, court rulings have made outcomes uncertain as well so the most conservative course is not to accept payments during this type of eviction either.