



Commercial Leasing

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The Availability of Self-Help Evictions to Commercial Landlords

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A landlord may re-enter leased commercial premises peaceably, without resorting to court process, in those states where it is permitted, if the right to do so is expressly reserved in a commercial lease, either a) upon the tenant's defaulting on the payment of rent or other lease terms, or b) upon termination of the lease or the tenant's abandoning the premises.

This peaceable "self-help" remedy, which is available to commercial landlords in at least 12 states (Alabama, Alaska, Arizona, Georgia, Hawaii, Maryland, Mississippi, New Jersey, New York, Ohio, Texas, and Wisconsin), has been recognized at common law from time immemorial. Moreover, wherever it is recognized, the right of peaceable self-help re-entry is not abrogated by the statutory remedy of summary proceedings.

Seven states (Idaho, Massachusetts, Missouri, Montana, North Dakota, Virginia, and West Virginia) permit a commercial landlord's use of self-help only in cases of abandonment or certain other defined circumstances, but 18 states (Arkansas, California, Connecticut, Delaware, Florida, Illinois, Louisiana, Maine, Michigan, Minnesota, Nebraska, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, Tennessee, and Washington) and the District of Columbia now prohibit the use of self-help altogether, requiring instead that commercial landlords use only the judicial process to remove tenants in default or those who are otherwise wrongfully in possession. In the remaining 13 states (Colorado, Indiana, Iowa, Kansas, Kentucky, Nevada, New Hampshire, Oregon, South Carolina, South Dakota, Utah, Vermont, and Wyoming), there are no statutes or reported court decisions prohibiting the commercial use of self-help, and, therefore, the common law remedy may still be available to commercial landlords in those states.

Nevertheless, even in states where self-help is available, it has remained a neglected remedy. Attorneys who represent commercial landlords are often reluctant to advise their clients to use this neglected self-help remedy to regain possession of leased premises from defaulting commercial tenants. This reluctance stems, in part, from the perception that courts are generally hostile to a commercial landlord's use of self-help because it renders a forfeiture of the premises before a tenant can litigate its right to remain in possession. In addition, because of the lack of use of self-help, many attorneys are unfamiliar with this body of law and are hesitant to employ such an aggressive measure. Courts also refuse to approve use of self-help where there is ambiguity in the lease terms or factual questions concerning the expiration of the lease. Moreover, landlords who wrongfully eject commercial tenants from real property by force or other unlawful means, before the end of the lease term, may be subject to suit under statutes that allow tenants to sue for treble damages and to be restored to possession (see, eg, New York's Real Property and Proceedings Law, Section 853).

This combination of general court hostility and attorney reluctance to recommend the use of proper self-help measures has created a situation in which commercial tenants have been allowed to violate their leases or extend them based on technical or frivolous defenses, sometimes for months and years at a time, in blatant disregard of the lease terms. In addition to the loss of rental income that often accompanies such disputes, landlords faced with this situation lose valuable time to repair, renovate, and re-let their premises to responsible tenants. These circumstances also adversely affect any effort by the landlord to sell the leased premises to potential buyers.

It would seem, therefore, that, in those states that allow it, commercial landlords have every incentive to insist on including a proper and effective self-help provision in their commercial leases. With appropriate draftsmanship and proper execution of the self-help measures provided in their leases, commercial landlords should not be reluctant to exercise their right to peaceable re-entry whenever such action is warranted. Indeed, with the availability of self-help written into the lease, it is likely that most tenants are going to be very careful to avoid any action that will place themselves in default and thereby become subject to immediate peaceable eviction. In this way, commercial landlords may both a) provide an incentive for their tenants to comply with the lease terms, and b) be able, when compelled

a) provide an incentive for their tenants to comply with the lease terms, and b) be able, when compelled to use self-help, to re-let the premises in a timely fashion without having to await the outcome of costly and lengthy litigation before doing so.

Landlords who use self-help will not always avoid litigation. There may be the possibility of having to litigate a) whether the tenant was in default at the time of the landlord's re-entry, and b) whether the self-help used was peaceable and otherwise lawful. Nevertheless, for the landlord who is careful to document a tenant's default before re-entering the leased premises and who is equally careful to ensure that re-entry is accomplished peaceably, there should be little worry that a court will find either that the re-entry was not lawful or that it was done in a forceful manner. However, if it is not crystal clear that the lease term has expired or that the tenant is in default, the landlord should not use self-help, but should resort only to summary proceedings or other legal process. If there is any uncertainty about the landlord's right to use self-help in the particular circumstances involved, then self-help should not be used.

Still, recognizing that the outcome of any litigation is always uncertain, a landlord may view the remote possibility of a future, adverse, treble damages judgment as a risk worth taking in order to obtain the real, current ability to re-let the premises to a responsible tenant who will pay rent during any litigation that ensues between the landlord and the evicted tenant.

In deciding whether or not to run that risk, the landlord should consider the kind of damages that the evicted tenant will have a right to claim; ie, whether any injury caused by the re-entry will be limited to property damage only or whether the evicted tenant will be able to claim and prove damages measured by the loss of the value of the leasehold. Where the lease has expired or been terminated by reason of the default, the tenant is not entitled to possession. In that situation, the tenant's damage is likely to be limited to such property damage as may occur during the course of the re-entry only — the sum of which a landlord may be more than willing to bear — but a judgment that the landlord may also be able to avoid by taking care to see, as noted below, that the tenant's property is carefully removed from the premises and placed in a reputable storage facility.

Whether a landlord's re-entry is deemed peaceable or not will depend on whether it is made in a "forcible" manner. For a re-entry to be forcible, the force used:

must be unusual and tend to bring about a breach of the peace, such as an entry with a strong hand, or a multitude of people, or in a riotous manner, or with personal violence, or with the threat and menace to life or limb, or under circumstances which would naturally inspire fear and lead one to apprehend danger or personal injury if he stood up in defense of his possession. *Fults v. Munro*, 202 NY 34, 39 (1911).

In the absence of force that tends to breach the peace, hiring trucks and men and even a garbage company to evict a tenant does not constitute forcible entry. However, to ensure that its use of self-help is indeed "peaceable," the landlord should arrange for the re-entry to occur during late night/early morning hours when the tenant's business is closed. The landlord's agents should be certain that no one is present on the leased premises before entering. Upon re-entry, the landlord may change the locks or padlock the doors. To thwart any potential damage claims, the entire re-entry operation should be videotaped, and all items of tenant property removed from the premises should be photographed and inventoried. The tenant's property should then be placed in storage for a reasonable period of time, in accordance with a lease provision that contemplates such action in the event of an eviction.

Ultimately, whether or not the landlord is permitted to use self-help to regain possession of the leased premises will depend on whether the landlord's right to do so is reserved in the lease. The lease should expressly provide a) that, if the tenant defaults in the payment of rent or commits any other violation of the lease constituting a default, the lease shall terminate automatically; b) that the landlord may thereafter recover possession in accordance with its common law rights, and c) that the landlord may do so without any duty, requirement, or necessity to provide due process or to seek prior court approval, through summary dispossession proceedings or any other action or proceeding at law, before evicting the tenant and removing tenant's property and/or any person from the premises. Such a provision does not preclude the landlord from initiating summary proceedings if it chooses to do so. However, the landlord should exercise its options carefully. If the landlord does not use self-help initially, but commences a summary proceeding in the first instance, the right to use self-help thereafter may be waived.

The lease terms should also obligate the tenant to pay the landlord all monies owed by the tenant up to the time of the landlord's recovery of possession, whether the landlord recovers possession through self-help or summary proceedings. In addition, the lease should reserve the landlord's right to sue after re-entry for any damages incurred as a result of the tenant's actions, such as an unlawful holdover that causes the landlord to lose an opportunity for re-letting the premises. The lease should also provide

that the landlord need not assert such claims against the tenant in summary proceedings only, but may do so in a separate plenary action.

Self-help is a useful tool that commercial landlords should always write into their leases in those states that permit it. Doing so will provide them with much needed leverage and flexibility for dealing with recalcitrant tenants who continually ignore their leasehold obligations. While there are decided risks involved in using self-help measures, the careful landlord and the careful landlord's attorney should generally be able to avoid the pitfalls that exist and make self-help work to the landlord's benefit in the long run. In a world where property owners are forced to endure the arduous and time-consuming litigation process before regaining possession, attorneys in those jurisdictions that allow it, should add self-help to their arsenal of remedies.

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