

An Overview of Landlord Rights and Remedies under Tenant Default

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When a tenant defaults on a commercial lease, there are a multitude of remedies available to a landlord, and it can be quite daunting to determine how best to respond.



The best place to start is with the nature of the tenant default -- was there a monetary (ie. unpaid rent) or non-monetary (ie. abandonment of premises) default?

Remedies for monetary default are broader than those for non-monetary default. The remedies available for unpaid rent will be addressed first followed by remedies for abandonment of premises.

I. Remedies for Unpaid Rent

As a brief overview, the remedies that are available to a landlord upon monetary default by a tenant are as follows:

1. The landlord may attempt to negotiate a solution with the tenant -- this does not terminate the lease, unless the parties agree to it;
2. The landlord can seize (distrain) and sell the goods of the tenant left on the premises for rent arrears -- this does not terminate the lease, if done properly;
3. The landlord can attempt to take security for the rent arrears if the tenant is willing to give it -- this does not terminate the lease;
4. The landlord can insist that the tenant perform the terms of the lease and sue the tenant (if need be, on a monthly basis) for the rent as it becomes due -- this does not terminate the lease;
5. The landlord can terminate the lease with proper notice, sue the tenant for rent arrears and also claim damages for losing the benefit of the unexpired balance of the lease term -- this terminates the lease.

It is important to be mindful of the terms of the lease when determining what course of action to take (eg. whether notice must be given, etc.).

Remedy no. 5 is often the most desirable solution when a landlord wishes to re-let the premises in the near future, as it allows the landlord to re-let on his or her own terms and still pursue damages for rental arrears and the balance of the lease term.

II. Remedies on a Tenant's Abandonment of the Premises

Where a tenant has abandoned its premises entirely, the landlord may:

1. Demand performance and treat the lease as a valid and subsisting agreement by leaving the premises as they are, and may sue the tenant for all rent and other charges under the lease as they become due (however, the landlord must leave the premises vacant for the remainder of the lease term) -- this does not terminate the lease;
2. Advise the tenant of the taking of possession to re-let the premises on the tenant's behalf, without terminating the lease, and sue the tenant for any rent arrears plus any difference between the rent in the original lease and the rent from the new tenant -- this does not terminate the lease;
3. Seek injunctive relief by treating the lease as valid and existing and obtaining an order to force the tenant to re-enter the premises and continue to operate its business therein (though this is only available where a lease contains a covenant by the tenant to continuously operate its business in and from the premises and is practically very difficult to achieve) -- this does not terminate the lease;
4. Commence legal proceedings for losses caused by the tenant's abandonment of the premises, including lost percentage rent from other tenants who leave as a result of the abandonment or losses caused by a decline in the property's value (this can be quite difficult to prove) -- this terminates the lease;
5. Terminate the lease, take possession of the premises and sue for any rent arrears and for damages for the lost benefit of the remainder of the lease term -- this terminates the lease.

When proceeding on the basis of a non-monetary default by a tenant, termination of the lease cannot be effected without notice to the tenant. Subsection 18(2) of *The Landlord and Tenant Act* (Manitoba) provides that for a breach other than non-payment of rent, a landlord wishing to terminate the lease must serve a notice on the tenant specifying the breach of covenant complained of, and if it is capable of remedy, requiring the tenant to remedy the breach within a reasonable period of time and to pay to the landlord reasonable compensation for the breach.

III. Terminating the Lease

An option available to a landlord faced with a tenant which has not paid rent is simply to terminate the lease.

There are basically three different methods by which a landlord can effect a termination of a lease:

1. By physically re-entering the premises;
2. By applying to court; and
3. By a regular civil action for possession.

The easiest way to terminate the lease is by actual physical re-entry into a leased premises and obtaining possession of the premises to the exclusion of the tenant. This can be done by a simple measure such as changing the locks.

IV. Landlord's Rights upon Termination

The landlord's rights upon termination of a lease are:

1. To take the position that the lease is still in effect and to insist on the performance of the lease by the tenant and to sue for rent arrears as they became due;
2. To terminate the lease and sue the tenant for the amount due under the lease as at the time of termination, but not thereafter;
3. To notify the tenant that the landlord is re-entering the premises on behalf of the tenant, acting as agent, for the purpose of re-letting the premises on the tenant's behalf and claiming against the tenant for any shortfall in the rent for the balance of the term;
4. To terminate the lease and re-enter the premises and notify the tenant that the landlord intends to sue the tenant for rent arrears *and* for damages for losing the benefit of the unexpired balance of the term of the lease based on the present value of future damages and rental streams.

This last remedy allows a landlord to claim for lost future rent and for consequential losses that may result from the loss of the tenant. An example of consequential losses might be the loss of other tenants a landlord suffers when an anchor tenant leaves a premises. The landlord, however, has a duty to try and mitigate its losses. This essentially means that a landlord must do its best to find a new tenant willing to pay market rent.

V. Deciding What Action to Take

When choosing to terminate a lease, there are a few points that a landlord must keep in mind:

- The relevant terms of the lease agreement should be carefully examined, as the terms will influence the available remedies.
- A landlord must not do anything which might constitute a waiver of its termination of the lease. Waiver is established by showing an act inconsistent with the termination of the lease. The most obvious example of this is the acceptance of rent by the landlord after the date of the breach. If a lease is terminated, the landlord should not accept rent payments after the date of breach as this may negate the termination. A landlord still has the right to claim for rent arrears prior to the breach, but no rent should be accepted for the time period after a breach which the landlord uses as the basis for termination.
- Where a tenant voluntarily offers up possession of the premises, this can be considered a surrender of the lease. When a landlord wishes to terminate, it should not accept a surrender from a tenant and should make clear that it is terminating a lease rather than accepting a surrender. If a surrender of a lease is accepted, this will negate a claim to damages made by the landlord after the surrender.

Due to the wide array of remedies available to a commercial landlord upon the default of a tenant, it may seem confusing to sort out just what course of action a landlord should take upon a tenant's default. The most important point for a landlord to keep in mind is what he or she ultimately wants to obtain by any action, and while it is difficult to decide which action to take, we are happy to assist with answering any questions.

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