

Kimball, Tirey & St. John LLP

Stip to Cure Your Woes

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In an earlier column, I mentioned that I would touch on the use of “stipulations” (“stips”) in problem-solving. A significant part of my time each day is spent negotiating with opposing counsel when his/her client has the temerity to breach the lease and get sued by the client of yours truly. The usual reason is failure to pay rent, but it could be a covenant breach (e.g. assignment/subletting without consent or having a mechanic’s lien recorded against the property), a 3 day quit notice for non-curable conduct (having a meth lab in the bathroom) or holding over after expiration of the lease term. Anyway, the tenant did or failed to do something and gets embroiled in lease termination litigation. Now, you say, why should we have talk to their attorney about it, it’s a free country and it’s our property, just tell the lessee to get out! Well Sparky, I wish it was that easy!

When we sue someone, they have the right (not God-given) to defend themselves. Oh well. This means that if they dispute the charging allegations in our complaint, they can file an answer with the Court or challenge the contents or manner of service of the complaint by what are called “law and motion” proceedings. This translates to money lost (and worse, more attorney fees) while the lease litigation winds its way through the process. A lessee can conduct discovery, (e.g. take your deposition, make you answer written questions called interrogatories), ask for a jury trial, appeal and post a bond (rare), and generally make life as miserable and expensive for you as possible. This is what you get for trying to enforce your rights under the contract.

Is there a way to avoid this? Well, maybe. Routinely, when opposing counsel calls me about a matter, I will invite him/her to indicate to me what his client’s perspective is on the whole thing and after the ensuing (either woeful or antagonistic) litany, gently remind that person that there is a real world out there where rationalization falls short of legal defense. We can then explore alternatives. Does the tenant need additional time to cure the default? To vacate? Does the lessee want less, more, or other space? Does either party want to extend or terminate the lease? Shall we amortize arrearages, defer estimated common area maintenance expenses with a balloon payment later? Shall we discuss a turnover of a completely furnished/fixed retail business to serve as a turn-key operation (call the leasing agent and the tenant’s lender before you go there) in return for a lease surrender? We can do it all with a stip.

Remember, we are suing this person or entity while we are talking about these things, so they may be a tad more compliant, or panicky, while it’s being discussed with counsel. If the other side is willing to listen (meaning the tenant’s attorney is not a living example of the need for retroactive birth-control) the inclination is to get whatever they can get, and move on. Limitations do come into play whenever we choose a complaint to treat the problem, in that whatever we are litigating is all we are entitled to, ***unless we stipulate to add other things into the mix***. If the complaint is asking for an award of rents, possession of the premises and attorney fees, that’s all we can get unless the other side is looking for something from us, then its open season on what we can accomplish! We can draft agreements that amortize arrearages over the course of several months, and tie in the duty to pay accruing rental while this payment plan is being met. This gives us (in a properly worded agreement) the right to terminate the tenancy based

upon the existing case, if there is a failure to pay future rent. We can't (normally) get an award in the stipulation for that future rent, but we can take the space back. We don't have to serve any more notices, or file another complaint. We can end the relationship based on the action we have already filed. A stipulation acts as a case disposition, but it is also a contract that must be performed.

We must be careful not to involve the jurisdiction of the Court in perpetual collection issues, because Judges don't like stips that penalize now for what may happen later. However if there is a pre-existing default that beckons a work out agreement, such can be the basis for the expedited termination of possession and a money judgment for the arrearage, without further muss or fuss. Stips are not limited to State court. Over in the Federal Bankruptcy Court, "adequate protection" agreements are *de rigeure* and normally provide that a failure to make back payments on a mortgage, chattel mortgage (e.g. car or boat) or lease, will entitle the creditor to continue with whatever relief he has sought in the court, whether it is to conclude foreclosure proceedings or take back the (leased or personal) property. Lots of times we don't really want the property back, we just want to GET PAID...

Over the years there have been some strange things included in stipulations. We have disposed of personal injury claims, libel/slander allegations, mutual restraining orders, the always popular general release of claims/confidentiality provision, and demands that we comply with the "implied covenant of good faith and fair dealing" implicit in all leases (so why would we contract not to?).

One quick war story: We had a residential matter where the tenant complained the omnipresent resident manager was "peeking" at inappropriate times, and wanted to sue everybody and their mother over it. The owners didn't know who was telling tales on this one. Before we called our client's insurance carrier, we noticed the tenant was delinquent in rent for that month and had been served with a notice and complaint. Considering the tenant was perhaps manipulating the situation, negotiations came to pass, relocation to another neighboring complex occurred, rent was paid over the course of a two month payment plan, and the stipulation disposed of all issues. The resident manager, by the way, went into another line of work shortly thereafter (no, not doing something related to that word that rhymes with "lawyer"). It's nice when it works out. Sometimes, court action does the darndest things!! So keep it in mind.

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