

Kimball, Tirey & St. John LLP

Writ of Attachment Primer for California Commercial Landlords

Cynthia D. Stelzer, Esq.

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After a commercial tenant breaches a lease, it may be necessary for the landlord to sue the tenant or guarantors to recover unpaid amounts. Early in the litigation process, landlords should consider pursuing a prejudgment writ of attachment. A writ of attachment creates a lien on the debtor's property before a judgment is entered, making it less likely that a debtor could sell, transfer or refinance the property while litigation is pending. A writ of attachment can be a powerful tool, encouraging settlement before trial.

A writ of attachment will be issued only if the claim is:

- For money;
- Based on an express or implied contract;
- For a "fixed or readily ascertainable" amount of \$500 or more, (excluding costs, interest, and attorneys' fees);
- Unsecured, or secured only by personal property including fixtures; and
- Commercial, and if the claim is against an individual, the claim must arise out of the individual's conduct of a trade, business or profession.

Many commercial breach of lease and some breach of guaranty cases meet these requirements.

Timing of a Writ of Attachment

A creditor may seek a writ of attachment on an ex parte basis (immediately on an emergency basis) or after a noticed motion (with at least 16 court days advance notice). The court will issue the writ on an ex parte basis if the landlord can demonstrate "great or irreparable" injury to the landlord if the matter was heard after a noticed motion. This normally requires the creditor to show that the property to be attached will disappear or be harmed if the court's decision was delayed to provide for a noticed hearing. If a creditor seeks a writ of attachment on an ex parte basis, sometimes a court will decline to issue a writ of attachment on an ex parte basis, but will instead issue temporary restraining order, which prevents the debtor from selling, transferring or refinancing the property until after the hearing.

Writ of Attachment Process

If the court finds attachment is proper, it will issue a right to attach order. Recording the writ of attachment puts third parties on notice of the attachment lien to prevent any transfer or encumbrance of the attached assets.

A writ of attachment is a powerful remedy that may benefit many landlords. Landlords who have filed lawsuits against tenants or guarantors may wish to explore with their attorneys whether a writ of attachment should be sought.

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