Understanding Landlords' 'Self-Help' Rights

By John G. Kelly

"Self-help," in a leasing context, typically refers to the landlord's traditional remedy of locking out the defaulting tenant and taking back the premises without going through the judicial system. Historically, under the common law, a landlord was free to choose its remedies against a defaulting tenant with few limitations, including the liberal use of self-help. However, modern jurisprudence provides tenants with much greater protection from eviction and also seeks to prevent possible violent landlord-tenant confrontations. Therefore, the majority of states have now abolished the traditional rule of self-help, and permit landlords to evict tenants only through court proceedings. In connection with the move away from self-help, most states have established summary eviction proceedings which, in theory, provide landlords with a more efficient and expedient method of retaking possession than traditional civil litigation.

Even with respect to those states that continue to recognize a landlord's right to self-help, many attorneys are very reluctant to recommend this remedy for their landlord clients, given: 1) the exposure for significant liability to the tenant if the tenant has a valid defense to the alleged default; 2) the availability of summary ejectment proceedings; and 3) the often correct perception that courts take a dim or outright hostile view toward self-help. Further, in the minority of states that still permit a landlord to exercise self-help, the remedy is often limited to commercial landlords, as residential tenants are afforded much greater protection. For the commercial landlord or tenant, this article focuses on the widely differing treatment of self-help — using the respective laws in the neighboring jurisdictions of Maryland, Virginia and the District of Columbia as illustrative of these differences.

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Virginia

In Virginia, the commercial landlord retains the traditional remedy of self-help with certain importation limitations. First, the lease must not specify otherwise, so the default and remedy provisions will require great scrutiny for the existing lease and careful drafting for the lease under negotiation. Second, the landlord must not create a breach of the peace or use unreasonable force. To avoid a breach of the peace, most landlords in Virginia exercising self-help choose to change the locks in the middle of the night while the tenant's business is closed and the premises unoccupied. As in most states, self-help remedies have been eliminated for residential landlords pursuant to the Code of Virginia sections 55-225.1 and 55-248.36.

The leading Virginia case on commercial self-help remains *Shorter v. Shelton*, 183 Va. 819 (1945), in which the Supreme Court of Virginia reaffirmed the landlord's common law right of entry. *Shorter* makes clear, however, that no more force than is reasonably necessary is permitted and that liability for the excessive use of force by a landlord is recognized. The right to self-help in Virginia applies only to recovering possession of the premises; it does not provide the landlord the additional right to unilaterally seize the tenant's personal property to sell at auction. Seizing of personal property under the landlord's lien, if permitted under the lease, requires obtaining a distress warrant by judicial process which is expressly governed by the Virginia Code. A landlord who does not carefully follow the legal procedures could likely be subject to significant liability for unlawful seizure.

Maryland

Maryland is similar to Virginia in the approach to self-help, but Maryland courts strongly discourage the use of self-help preferring landlords to exercise their judicial remedies. The lease must be clear that re-entry is an available remedy for the landlord without an express prohibition against self-help. The tenant must also be in default under the lease beyond any applicable notice and cure period. Finally, the retaking of possession by the landlord must be peaceful. A residential landlord in Maryland may never employ self-help, but can only pursue eviction through the judicial process.

The leading Maryland case on this subject remains *K&K Management, Inc. v. Lee*, 315 Md. 137 (1989), where the Court of Appeals of Maryland makes clear that re-entry is a proper remedy after a breach of a commercial lease, and that it is not necessary for the landlord to resort to legal process provided the repossession can be effected peacefully. The court in K&K Management provides, however, that "(w)e do not encourage resort to self-help, and, for all of the practical reasons which the instant action makes abundantly clear, the Bar usually counsels against it."

In a subsequent case decided by the Court of Special Appeals, *Nicholson Air Services, Inc. v. Board of County Commissioners*, 120 Md. App. 47 (1998), the court reaffirmed the ruling in *K&K Management*, finding that the statutory remedy of summary ejectment is not mandatory as the exclusive remedy in Maryland when self-help is authorized under an express provision of a commercial lease. However, the court made clear, again, that the statutory summary ejectment procedure is the preferred mechanism for repossessing property in

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Maryland that is wrongfully held by a tenant. Last, relating to the question of what constitutes a "breach of the peace" or a "wrongful" eviction, in the context of self-help, the court in *Nicholson Air Services* affirmed that wrongful or unlawful conduct, in relation to interference with the economic relations of a landlord and tenant, is "violence or intimidation, defamation, injurious falsehood or other fraud, violation of the criminal law, and the institution or threat of groundless civil suits or criminal prosecutions in bad faith."

Because of Maryland's stated preference for the judicial process and discouragement of self-help, the commercial landlord choosing to move ahead with self-help must avoid any possible disturbance of the peace, no matter how trivial. Note that similar to Virginia, the right to self-help in Maryland is limited to regaining possession of the premises. The right to create and enforce a lien on the tenant's personal property can only be effectuated through judicial process.

District of Columbia

The District of Columbia has followed the modern trend away from self-help. It is settled law that a commercial or residential landlord in Washington, DC, cannot use self-help to evict a tenant. In *Simpson v. Lee*, 499 A.2d 889 (1985), the District of Columbia Court of Appeals held that neither the landlords of commercial nor residential property can employ the common law right of self-help. In an earlier case, *Mendes v. Johnson*, 389 A.2d 781 (1978), the court reasoned that when Congress created a summary judicial process to enable a landlord to reacquire possession of property on an expedited basis, Congress necessarily abrogated the landlord's right to self-help. Accordingly, the Mendes decision found that a landlord cannot unilaterally evict tenants by, for example, changing the locks or removing their personal possessions.

There are many cases in the District of Columbia upholding a tenant's claim for wrongful eviction, so a landlord operating in this jurisdiction would be well served to closely follow the express statutorily requirements and detailed court procedures.

Analysis

Because of the potential liability for damage to the tenant's property and interruption of the tenant's business, landlords must tread very carefully in Virginia and Maryland, or other states recognizing variations of the traditional common law rule, before deciding to exercise self-help. In many cases, the practical considerations should control, with exercising every legal right afforded under the lease not always being the wisest decision for the pragmatic commercial landlord.

Many conservative and prudent attorneys will never advise their commercial landlord clients to exercise self-help, because of the risks of liability and the relative ease of modern summary ejectment procedures. If the tenant has any valid defense or is not truly in default under the lease beyond any applicable notice and cure period of if the lease does not actually permit self-help, it could result in substantial liability should the landlord ignore the use of judicial process. Other attorneys will counsel their landlord clients to take a more aggressive approach, arguing that immediate repossession of the premises with the possibility to release at market rates more than offsets the potential exposure to damages. They reason that by utilizing the self-help remedy and including the provision in their lease forms, the other tenants of these landlords tend to be more careful to avoid defaults and become subject to an immediate eviction.

Other important factors to consider that may push some landlords toward self-help include the potential for tenant's bankruptcy, the material nature of the tenant's default, the reasonableness of the tenant's possible defense, the value of personal property and equipment remaining on the premises and the need to protect the premises from possible damage by the tenant. Of the factors listed above, the tenant's likely bankruptcy may be most important, given the additional time and expenses incurred in a judicial eviction under a bankruptcy proceeding.

Instead of taking the view that self-help should never be utilized, it is best to analyze each situation on a case-by-case basis since self-help, when correctly applied, can be an effective option for the careful landlord. If the landlord does decide to exercise self-help, it is paramount that repossession be peaceful, witnessed and well documented with all of the tenant's personal property inventoried and protected. Further, self-help should only take place during a time when there is no possibility for a contentious disturbance or breach of the peace. If the tenant resists in any fashion or arrives during the changing of the locks, the landlord is better served to back down as use of the formal judicial process could spare the landlord in the long run. No use of force, even minimal, should ever be used.

Most importantly, commercial landlords and tenants need to review the default and remedy sections carefully when negotiating and drafting the lease agreements. Many landlords as a matter of philosophy have decided never to exercise self-help, given the many risks, so they often will agree to prohibit self-help when negotiating with larger creditworthy tenants. Other landlords have had positive experiences with self-help, and will want to insist that their leases provide them such rights. National tenants will likely strongly resist such language, given the administrative burden of operating many locations under leases with different landlords, and will insist on their right to have their day in court before an eviction can be realized. Sample

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instead of being two months in arrears throughout the term. There would be a reconciliation after the end of the percentage rent only term, comparing actual rent calculated upon gross sales during the final two months of percentage rent to the prepayment amount previously paid.

CO-TENANCY

Perhaps the most hotly negotiated provision in retail leasing today involves the co-tenancy clause. While many tenants in larger centers want to know that one or more national tenants will be operating in the center, and that a minimum percentage of tenants will be open alongside the tenant in question, landlords are often unable to satisfy these provisions — through no fault of their own. Tenant vacancies, bankruptcies and assignments have been occurring at alarming rates over the past four years, and a landlord can find itself in a snowball situation, where one vacancy can trigger a mass of future terminations. That is why many landlords are committing only to an "opening" co-tenancy, instead of an "ongoing" co-tenancy. The landlord must also take care to provide for substitution and replacement in those situations where ongoing co tenancy is required. Two tenants, occupying at least 80% of the space of a larger anchor, should be an acceptable replacement for a larger anchor where the two tenants are also national or regional. A tenant may require that each replacement be at least 30% of the square footage of the original tenant. A tenant should not be given remedies where the violation is temporary — due to remodeling or restoration of the requisite co-tenant.

If there is a co-tenancy violation resulting in remedies in favor of the tenant, a situation similar to an exclusive violation should exist. The tenant should only be allowed a rent reduction for a period of time (12 months, for example), following which the tenant should be required to terminate the lease (during a short window period) or return to paying full rent. The tenant should not be given any remedies, however, if, in fact, the tenant has no covenant to operate. The tenant can only exercise its remedy for a co-tenancy violation if it is required to remain fully open for business.

CONCLUSION

Although several other issues exist that are particular only to retail leasing, the above discussion should alert both landlords and tenants to some of the more controversial provisions unique to shopping center leases. Armed with knowledge of these issues and the concerns of each side to the transaction, both landlords and tenants should be able to reach a middle ground satisfactory to them both.

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suggested language that favors the landlord and tenant, respectfully, is found below.

When representing commercial landlords in states that allow self-help, language similar to the following should be included in the remedy provisions:

> Then and in any such instance, Landlord, without further notice to Tenant, shall have the right to exercise any and all rights or remedies available to Landlord at law, in equity or otherwise, arising from such default, including but not limited to the right to (i) terminate this Lease, or (ii) with or without terminating the Lease, re-enter upon the Premises, with or without process of law, remove Tenant, including all persons and personal property from the Premises, and relet the Premises in Landlord's name for the account of Tenant for the remainder of the Term upon terms and conditions reasonably acceptable to Landlord. In the event of such re-entry, Tenant hereby waives all claims for damages which may be caused by the re-entry of Landlord and will save Landlord harmless from any loss, damages or cost suffered by Tenant by reason of such re-entry. Notwithstanding the foregoing, Landlord shall have no duty to mitigate the damages suffered by Landlord rising from the default by Tenant of any of its obligations under this Lease.

When representing commercial tenants in states that allow self-help, language similar to the following should be included in the remedy provisions:

> Notwithstanding anything in this Lease or under applicable law to the contrary, Landlord shall not re-enter or retake possession of the Premises or Tenant's personal property except by exercise of legal process, and shall not undertake "self-help" means of regaining possession of the Premises. Landlord agrees to use commercially reasonable efforts to mitigate its damages by re-letting the Premises.

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