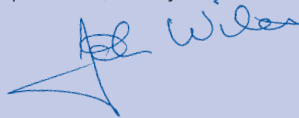


A Note From The Managing Partner

Welcome to yet another addition of our quarterly Newsletter for Real Estate Professionals. Many things have happened since our last newsletter including our fall golf tournament. Turn to the back to see the winners and the results. Additionally, we have added two new employees Eloise May and Leigh Ann Millican. As you will read, Eloise is an experienced bankruptcy lawyer who just left clerking for a bankruptcy Judge in Tennessee with Eloise's membership in the Mississippi Bar we can now help you with problems in Mississippi.

We are often asked to provide classes to our clients concerning landlord/tenant issues and rent collection. We are proud to announce the first ever Wiles & Wiles class scheduled for March 27th, 2003 at the Galleria. More details and our sign-up sheet are in the back. As always, we appreciate the opportunity to discuss any issues that are raised in this newsletter. We can suggest that if you have questions, that you consult us



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Designation Rights: What you don't know can kill your Shopping Center

By John J. Wiles, Esq.

With the retail economy in trouble and major retailers filing bankruptcy, a new anti-landlord procedure has sprung forth in large bankruptcy cases. Tenants have found a powerful way to raise immediate cash while forestalling the decision on whether to assume or reject your Leases. The new process is called the Sale of Disignation of Rights.

Currently, several large real estate companies are participating in bankruptcy cases such as Kmart and are offering to pay the debtor a large sum of money in order to obtain the right to decide to assume or reject your lease. The landlord's current rent is paid, but the time to assume or reject your lease is extended for as much as two years from the statutory 60 days! As can be expected, Judges are very receptive to a large infusion of cash into the bankruptcy estate at the beginning of a case, as are the other creditors. Only you, the Landlord really suffers.

Importantly, the procedures to obtain this right to decide on your lease isn't done with a motion to extend the time to assume or reject your lease. As you probably know, a motion to extend time is served on your and you have some time to object. As we have previously urged, a landlord should always object to a motion to extend time. The same is true on the sale of designation rights. This new procedure is in essence a sale of property pursuant to 11 U.S.C. § 363, which permits the trustee or debtor to sell or lease property of the bankruptcy estate outside the ordinary course of business. As a result this sale only requires notice to all the creditors and twenty days for the

creditors to respond. Contained in this motion could be a long extension of the time to assume or reject your lease and an elimination of many important parts of your lease including exclusives and radius restrictions.

We attended the International Council of Shopping Centers Law Conference this past October, and the lawyer for the landlord who bought the Kmart rights explained that he makes the Motion and very few landlords object. He stated if they only had read the motion, they would see that they are giving up very valuable rights! According to him, if you object, he will give you almost anything to keep from having you appear at his hearing. The moral of the this story is always object, and never be afraid to go to court. If you don't object, you may wait for years to get your space back, and you will lose very valuable rights in your lease which might even put in default one of your other leases.

Useful Web Sites:

GA Secretary of State
www.sos.state.ga.us

Facility Resources
www.facilitiesnet.com

Property resources online
www.property-link.com

www.johnwiles.com

Credit Bureaus

www.equifax.com

www.experian.com

www.tuc.com

LANDLORD'S REMEDIES

WHEN THE TENANT FILES BANKRUPTCY

PART 3 - ASSERTING THE LANDLORD'S CLAIM FOR PAST DUE RENT

By Susan Estroff, Esq.

Proof of Claim. To get money from someone that has filed bankruptcy, you file a proof of claim. A "claim" is defined by the Bankruptcy Code as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured", or the "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment". 11 U.S.C. § 101(4) and (5). The definition is purposefully broad so that all legal obligations of the Debtor can be dealt with in the bankruptcy. 3 [Bankruptcy Desk Guide](#), pt. 6, ch. 22 at 9 (August 1996). The proof of claim gives the Debtor, the Trustee, the Court and other Creditors notice that the claim exists. A proof of interest is filed by an Equity Security Holder, commonly a stockholder, one who has the interest of a general or limited partner in a partnership or the interest of a proprietor in a sole proprietorship.

Typically, a creditor must file a proof of claim or interest (hereinafter collectively referred to as a "proof of claim") in order for the claim to be allowed. While there are certain circumstances in which a secured claim need not be filed, and in a Chapter 11 proceeding, a claim may be deemed filed if listed in the Debtor's schedules, it is always best to file a proof of claim so there is no question that all interested parties are given notice of the claim, and the amount of the claim is clear. Additionally, a duplicate copy of the proof of claim that is stamped "filed" or "received" by the court clerk or claims agent will be helpful to refer to if the debtor's attorney or the Trustee has questions, and it is proof for the landlord that the claim has in fact been timely filed.

A landlord should assert in its proof of claim any and all amounts owed by the Debtor tenant for base rent or minimum rent, as well as any pass through items such as CAM, taxes, insurance, utilities and other monthly charges. Most commercial leases also include provisions for the collection of interest, late charges and attorney's fees, and these amounts should be calculated and asserted in the proof of claim. Not all courts will award interest, late charges or attorney's fees, but landlords should assert all damages allowed by the lease and state law, just in case your debtor has funds to pay all its' debts. If the lease has been rejected in the bankruptcy, the landlord must assert a claim for "rejection damages" in the proof of claim, a statutory calculation which in most instances totals the rent and other charges due pursuant to the lease for a period of twelve months from the lease rejection date, unless the lease expires sooner.

The bankruptcy code states that a claim of interest as filed is deemed allowed unless there is an objection by a

party in interest, usually the Debtor. The code also sets forth the grounds upon which a claim may be disallowed, which standards are applied if there is an objection to a proof of claim. In general, a debtor or trustee will object to the claim of a landlord to the extent that the landlord has asserted lease rejection damages and the premises have been re-let, thereby mitigating the rejection damages. Generally, these matters can be settled without the necessity of a hearing.

Most importantly, if the Proof of Claim is not timely filed, the claim will be disallowed, and you will not get paid. As a general rule, the deadlines are as follows: in a Chapter 7 case the Proof of Claim deadline is 90 days from the date that the 341 meeting (the initial meeting with the Trustee of the case and the debtor that affords creditors the opportunity to question the debtor) is first scheduled to be held; in a Chapter 11 case, the Proof of Claim deadline is set by the Bankruptcy Court and in a Chapter 13 case, the Proof of Claim deadline is 90 days from the date that the 341 meeting is first scheduled to be held. If a Proof of Claim is not timely filed, a motion must be made to request that the Proof of Claim be deemed timely, and set forth the rationale. A court will weigh the factors present in the specific situation to determine if the failure to timely file the proof of claim was excusable neglect. The factors include the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was in reasonable control of the movant, and whether the movant acted in good faith. *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 (S.380 (1993)).

Application for Payment of Administrative Expense. A creditor may apply for payment of administrative expenses. In order to be characterized as an administrative expense, the claim must arise from a debt incurred after the bankruptcy is filed and in connection with a transaction between the claimant and the trustee or debtor in possession. *Guaranty Nat'l Ins. Co. v. Greater Kansas City Transp., Inc.*, 90 BR 461 (DC Kan 1988); *In re Keegan Utility Contractors, Inc.*, 79 BR 87 (BC WD NY 1987). 3 [Bankruptcy Desk Guide](#), pt.6, ch.24 at 57 (February 1997). For a landlord, an administrative expense is any rent or other charge due pursuant to the lease which becomes due after the Debtor has filed Bankruptcy and while the debtor or personal property of the debtor remains in the premises. A landlord may decide to file an Application for Payment of Administrative Expenses if the amounts owed post-petition by the Debtor are significant enough to warrant

the cost of paying an attorney to prepare and file the motion and appear in Court at a hearing. It is always a good idea to include as an administrative expense the cost to prepare and file the motion and appear at a hearing, but keep in mind that the Court may not award all the attorney's fees. A hearing on an Application for Payment of Administrative Expenses may be heard within 30 days of filing the Application, but if the Application for Payment is granted that does not mean the Landlord will be paid immediately. Often, the Court will allow an administrative expense and direct that it be paid along with all other allowed administrative expenses at a later date set by the Court. In many cases, an Administrative Claims Bar Date will be set by the Court, and, like a Proof of Claim bar date, if the landlord's claim for administrative expenses is not filed on or before the bar date, they cannot assert the claim and will not get paid.

When Will the Landlord Get Paid? The Bankruptcy Code lists the prioritization of claims for distribution. The Code is designed to generally make sure that there is an equality of distribution among creditors, and to that end, there are certain types of claims that have priority for payment ahead of general unsecured claims. Administrative expenses have the highest priority, along with judicial fees and costs, followed by any expenses incurred by the Debtor in the ordinary course of business post-petition but before the appointment of a trustee, and other claims for wages, salaries, commissions, unpaid contributions to employee benefit plans, claims for grain or fish assets; individuals claims for pre-petition deposits of money in connection with the purchase, lease of rental of property, and claims for taxes and customs duties. General unsecured claims will be paid last. Unless a landlord has filed a lawsuit and received a judgment and a judgment lien for pre-petition (pre-bankruptcy filing) rent, this rent will be a general unsecured claim and will be paid on a pro-*raa* basis after all other claims in the bankruptcy have been paid. It is not unusual for creditors with an unsecured claim to wait years after the bankruptcy filing to be paid.

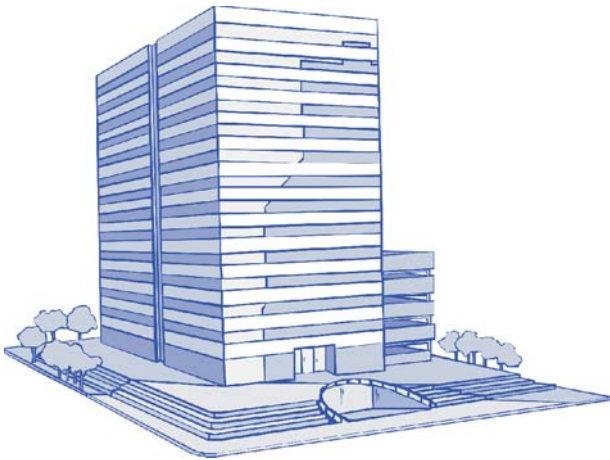
In short, landlords with tenants in bankruptcy must always file a Proof of Claim or an Application for Payment of an Administrative Expense in order to be in the pool of creditors that will be paid. There are deadlines either set by statute or set by the Court to assert the landlord's monetary claims, and if the deadline is missed, the landlord cannot get paid. Finally, the nature of the claim will determine how soon in the payment process the landlord will receive the money.

PARALEGAL'S PERSPECTIVE OF THE

Regardless of whether or not a file is sent to us for a dispossessory or a lawsuit, the end result you are seeking is money and possession. In order to obtain a Judgment so that we may collect, we must have personal service of the legal action upon the individual either as a person or as a registered agent of a corporation.

If a tenant is in possession of the leased premises, a dispossessory action is required to obtain possession and a Judgment. The first step is to place the tenant in default. This is done by complying with the terms of the Lease which usually requires sending a default letter via Certified Mail - Return Receipt Requested to the premises address and to any notice address which is set forth in the Lease. If the tenant is an individual, we also send the default notice to the home address, and if the tenant is a corporation, we send the default letter to the Registered Agent (as you can see, we try to give notice to anyone and everyone). The default letter sets out the amounts currently owed to the landlord including interest and late charges. Furthermore, notice is given pursuant to Georgia Statute 13-1-11 allowing the enforcement of attorney's fees.

In the event a partial payment is received following a default letter, we must be notified immediately. If the landlord



chooses to accept the payment, we will send a letter to the tenant acknowledging the payment, re-stating the rent default and demanding strict compliance with the terms of the Lease (which is also a Georgia Statutory requirement). If the landlord chooses not to accept a partial payment, the payment should be sent to Wiles & Wiles to return to the tenant. An important note about accepting partial payments: a dispossessory cannot be filed in the same month in which a payment is received. However, if a dispossessory is filed and then the tenant sends a partial payment, the landlord can choose to accept the payment, and at the

dispossessory trial the payment will be taken into account when calculating damages.

Once a default letter has been sent, and no contact and/or payment is made by the tenant, we can proceed with the next step in the dispossessory process by demanding possession of the Leased Premises. The demand letter is sent by overnight delivery to the notice address. Once we confirm the demand letter has been received, we can file the dispossessory action.

The dispossessory is filed in the county where the premises are located. Often, if the tenant has abandoned the Leased Premises, the dispossessory will be served by tack and mail at the premises. This type of service will only allow us to obtain a writ of possession, not a money judgment. Therefore, we try to obtain personal service at an additional address. If the tenant is an individual, we can serve them at a residence address by personal or notorious service, meaning we can serve the named tenant, or we can serve anyone over the age 14 who also resides with the tenant. If the tenant is a corporation, we serve the registered agent that the corporation has listed with the Secretary of State. However we must have PERSONAL SERVICE ONLY on the named Registered Agent! If the registered agent is evading service, we can try to serve an officer of the corporation. As a last resort, we can serve the Georgia Secretary of State on behalf of a Georgia corporation.

Once served, the tenant must file an answer within seven days of service. The Answer is filed with the Clerk of the Court where the dispossessory is filed. If an answer is filed, a trial date is immediately set for approximately 7 to 10 days later. If, in the Answer, the tenant demands a jury trial, we will generally file a Motion to Compel Payment of Rent into the Court. This is done to either force the tenant into paying the undisputed rentals into the registry of the Court, or if the tenant cannot do so, to secure a Writ of Possession from the Court.

If an answer is not filed, and we have personal or notorious service on the individual or corporation, we can apply for both a default judgment and a Writ of Possession. However, if the only service accomplished is tack and mail service at the premises, only a Writ of Possession can be obtained. In this situation, a separate action must be filed to obtain an

actual money judgment. This often entails research to obtain a better service address for the parties to be served. The separate action required is a lawsuit. A lawsuit is filed if the tenant has vacated the premises either voluntarily or by eviction. The lawsuit seeks damages for unpaid rent, deferred rent, damages to the premises, re-letting costs, commissions, attorney's fees (as much as the underlying lease will allow) etc. The lawsuit is filed in the county where the tenant or the Registered Agent is located, which may be different than the county where the leased premises is located.

If the damages sought are under \$15,000.00, a lawsuit can be filed in Magistrate Court. Once served, an answer to the lawsuit is due within thirty (30) days. After the thirtieth (30th) day, the defendants are in default. However, the Georgia Code provides defendants with the opportunity to "open" the default by paying court costs (the amount paid by the plaintiff to file the lawsuit) into the Registry of the Court and to then file an answer no later than the forty-fifth (45th) day after served. If no answer is filed after the forty-fifth (45th) day, we will apply for a Default Judgment.

If the total damages exceed \$15,000.00, the lawsuit may be filed in State Court, or, if a county does not have a State Court, in Superior Court. In State and Superior Courts there is a six month discovery period which begins the day an Answer is filed by a Defendant. This allows the parties to have six months to conduct discovery upon one another to develop the facts of the case. Discovery can include depositions, interrogatories, Requests to Admit or Requests to Produce documents. The discovery period can be extended by consent of both parties and Court Order.

If the lawsuit has been personally or notoriously served, and no answer is filed with the Clerk of Court, we can submit a Default Judgment immediately to the Court for the amounts asked for in the lawsuit, including costs of court.

In any above referenced action, we endeavor to serve the guarantor of the lease and include the guarantor in the pending action. Service requirements are the same, but this avoids the necessity of filing and pursuing a separate action against the guarantor.

Keep in mind, if a Bankruptcy is filed in either case scenario, it stays the pending action, be it a dispossessory or a lawsuit, until the bankruptcy is dismissed or the automatic stay is lifted.

Trisha Watson, Paralegal

NEW MEMBERS OF THE



WILES & WILES ADDS TWO NEW FACES

Wiles & Wiles is proud to announce the addition of Eloise H. May, associate attorney, and Leigh Ann Millican, paralegal. We are honored to have them as part of our team and look forward to a long and prosperous relationship.



Eloise comes to Wiles & Wiles from the United States Bankruptcy Court, Eastern District of Tennessee, Northeastern Division where she was a Judicial Law Clerk. Eloise received her undergraduate degree from Millsaps College in Chemistry and her law degree from the University of Mississippi School of Law. She has been admitted to the Bar in Georgia and Mississippi. Eloise will be a valuable asset to the firm.



Leigh Ann is the newest paralegal to join the firm. Leigh Ann earned her Bachelor of Science in Humanistic Psychology from the University of West Georgia and her Masters in Neuropsychopharmacology from Jacksonville State University. In 2002 Leigh Ann returned to the University of Georgia's Paralegal program where she graduated first in her class.

In another side note, the firm was sad to see Brent Stamps move, but wish him much success in the future, especially with his forthcoming nuptials.



Attorneys at Law

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LANDLORD/TENANT CLASS

We are often asked to teach a class on the Landlord Tenant procedures in Georgia, Florida and Tennessee. Come join us on March 24th at the Georgian Club. Topics will include dispossessory, suits on rent and bankruptcy.

When: Monday, March 24th, 2003
Time: 8:30 am to 1:00 pm
Where: The Georgian Club at Cobb Galleria

A continental breakfast and lunch will be provided. Parking is free. Please RSVP to 770-426-4619 or robertt@evict.net by March 19th.

