WILES & WILES

The Landlord's Lawyer

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Upcoming Events of Interest

09/10 Annual Wiles & Wiles Golf Tournament. Call For Info

10/13 ICSC Southeast Convention. Atlanta, GA

10/22 ICSC Law Conference, Palm Dessert, CA

10/28 ICSC Fall Conference, Las Vegas, NV

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EVICTIONS: WHY DO WE TELL YOU TO DO THEM WHEN YOUR TENANT DOESN'T PAY?

by John J. Wiles, Esq.

Many clients ask us why they have to file an eviction action to evict a tenant when they don't pay rent. The answer is quite clear-**the law requires it.** In Georgia, Tennessee, Florida and Mississippi, self help evictions are prohibited, and you must file a legal proceeding in order to regain possession of your premises. In fact, we recommend that you file an action to regain your premises even if the tenant shut down but left property in the premises. Quite simply, conducting an eviction is a relatively inexpensive way of protecting you from potential claims at a later date that you have taken or converted the property of the tenant or some third party, such as an equipment leasing company. Defending conversion claims can be quite costly and could result in an award of punitive damages against your company if you fail to legally regain possession of the premises.

The process is quite simple. Generally, you must tell the tenant that they have to get out (demand possession of the premises) and then file an action to regain possession. Once the eviction action is filed, the sheriff will serve it, and the party will have seven (7) days in Georgia, five (5) days in Florida, and unlimited time, prior to the scheduled trial, in Mississippi and Tennessee to file an Answer. The first hearing is always a non-jury hearing and the court usually handles these in a pro-forma manner, that is to say, not a long complex trial. At the trial, you usually can get a money judgment against the defendant if you've gotten good service, and thus not only can you obtain the right

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Interest Provisions in Your Lease: How They Can Cost You

by Susann Estroff, Esq.

Many landlords are cheating themselves out of money they are legally entitled to collect from tenants and unnecessarily driving up the cost of attorney's fees because of the poorly drafted interest provisions in their lease. Most owners and landlords use a standard lease form which contains remedies for the landlord in the event of a tenant default. These remedies, in the case of a monetary default, generally include charging the tenant interest on all past due rental amounts. It is never a bad idea to review this lease provision to make sure the language is adequate and that the interest due is easy to calculate.

The law in Georgia provides that all contracts for rent shall bear interest from the time the rent is due pursuant to

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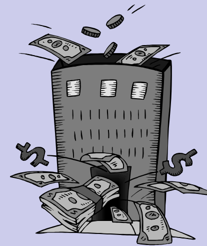
Interest Provisions

O.C.G.A. § 44-7-16. Generally, most commercial leases will provide that the tenant shall be required to pay interest on past due amounts as they become due, and specify an amount of interest. If the lease does not specify that interest is due, landlords may still collect interest pursuant to O.C.G.A. § 7-4-2(a)(1)(A), which provides that the legal rate of interest shall be at 7% per annum simple interest where the rate percent is not established by written contract. However, a lease should provide for more than 7%, and 18% interest has been specifically authorized by the Court in Duff's Enterprises, Inc. v. B.F. Saul Real Estate Investment Trust, 170 Ga. App. 9, 316 S.E.2d 21 (1984).

It is also common for a lease to provide interest at "the prime rate of interest plus 4%" or "the prime rate of interest as announced from time to time by XYZ Bank, plus 3%". While the prime rate of interest at any given time is ascertainable, it changes often and amounts which come due during a period of time when the interest rate changes will bear interest at different amounts. This can be cumbersome to calculate in a time period such as the year 2001, when the prime rate changed eleven times, mostly mid-month. For example, rent due on January 1, 2001 would be calculated using the prime rate at 9.5%. On January 4, 2001, the prime rate changed to 9.0% until February 1, 2001, when it changed to 8.5% until March 21, 2001, when it changed to 8.0%, and so on. Accordingly, if, on March 25, 2001, you sent a default letter for rent which had come due for January, February and March 2001, the January rent would have to be calculated at three different interest rates and the February and March rent at two different interest rates. The prime interest rate has stabilized recently, only changing a few times since 2002, but there is no guarantee it will remain stable. Such calculations over a period of time can become burdensome.

When the lease provides that interest shall be calculated according to the prime rate as announced by a particular financial institution or periodical such as the Wall Street Journal, the calculation of interest can become more difficult, in that you need to find out what the specific bank or periodical have announced as the prime rate over the relevant period of time. As banks merge with other banks, the bank listed in the lease may no longer be in existence, and you will need to determine the proper successor bank.



The prime rate as listed by XYZ Bank or the Wall Street Journal usually does not vary with the prime rate as listed anywhere else, but if you have a tenant in litigation, in order to properly prove to the Judge or Jury the amounts due and owing under the lease, we will need to prove that the interest was calculated based upon the exact lease specifications. This will require testimony or affidavits from a qualified bank employee of what XYZ Bank listed as the prime rate for the relevant period of time. If the bank listed in the lease no longer exists, you will need to submit proof that you have used the prime rate as announced by the successor bank, and proof that it is in fact the successor bank. Most importantly, you will need to find a person willing and able to testify or swear on behalf of the bank - this is not as easy as it sounds! In one instance, a financial institution refused to indicate who would sign such an affidavit, and we were required to subpoena the bank to submit to a deposition concerning the prime rate. As you can imagine, this involved hours of time for attorneys and increased attorney's fees to the landlord.

The bottom line is that you need to review the interest provisions in your lease to make sure that they are providing for the landlord to collect an adequate amount of interest (remember that anything up to and including 18% has been upheld in Georgia Courts) and that the calculation of the interest and the interest rate is not overly burdensome, which may cost the landlord in litigation fees. WILES & WILES

Susann Estroff is the Senior Associate with Wiles & Wiles.

Fulton County Increases Filing Fees

The Fulton County State Court has increased its filing fees for dispossessories and garnishments by 54%. It now costs $100.00 to file a new dispossessory action or a garnishment. This does not include the cost of service. No reason was given by the Fulton County court as to why this substantial cost increase was needed, although it is probably related to the current fiscal problems in the county as a whole. We continue to have a problem with the State Court regarding lost pleadings and prompt handlings of pleadings notwithstanding the higher fees!

Evictions

to evict them, which is called a Writ of Possession, but you also have a judgment upon which you can collect

After you've obtained your judgment and Writ, the tenant has a few days to appeal, and after the appeal process has expired you can evict the tenant. The eviction process is not too complicated, and we recommend employing a third party independent contractor to conduct the actual eviction in order to provide more insulation for the landlord against potential claims.

One question we often are asked is what do you do if the property contains hazardous materials? We recommend that if your premises contain hazardous materials, such as printing or dry-cleaning chemicals, you employ a hazardous waste removal contractor. While this can be an expensive option, the landlord is ultimately responsible for hazardous waste being on its property. Importantly, the sheriff will not allow you to evict hazardous materials from your premises and onto the public right of way.

In conclusion, while evictions may seem complicated or unnecessary, they are a fairly quick way to get your premises back and are the best method to insulate the landlord from potential liability concerning property in the leased premises. It is also important to realize that they can be relatively inexpensive compared to the cost of defending a lawsuit for wrongful eviction or for conversion.

John Wiles is the founder and managing partner of Wiles & Wiles.

ATTENTION PLEASE...

Most of you know our senior paralegal, Vic Newmark. What most of you may not know, however, is that over the last three and a half years, Vic has been attending law school at night while working full time at the Firm during the day. *We are happy to announce that this past May, Vic graduated from law school with multiple honors including The Aspen Book Awards in Constitutional Law, Civil Procedure and Property AND The American Bankruptcy Institute Certificate of Excellence.* Vic will continue to concentrate in the areas of civil litigation and bankruptcy. We look forward to Vic's continued contributions to the Firm and our clients.

Congratulations Vic!
We Are All Very Proud of You

Watch for Wiles & Wiles next installment of Landlord— Tenant class coming in the fall of 2003.

Get your ideas in for future classes at class@evict.net

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LANDLORD-TENANT 101 HAS OUTSTANDING RESPONSE

WORK TRUANCY UP AS RESULT

Wiles & Wiles offered its first installment of Landlord-tenant classes to its clients this spring. The class was a huge success, with over 50 attendees. Thanks to those who attended and to our staff for really trying to cover all the bases. The class was held at the Georgian Club at The Cobb Galleria and encompassed most phases of the property management and leasing process as it pertains to a landlord's legal rights and remedies.

This is not the first time the attorneys of Wiles & Wiles have taught a class. They have been invited in the past to teach classes for continuing legal credits at regional and national conventions. It is, however, what we hope will be the first in a series of classes or seminars for our clients. "I'm excited so many people wanted to take part in our class," managing partner John Wiles commented. "The more we can teach them the better their business will run and the easier it will be for our firm to solve their real estate problems."

Wiles & Wiles is in the planning stages for the next class. The tentative topic is Landlord-Tenant 102: *Leasing: A Basic Primer for Leasing agents and property managers*. If you are interested in attending, have a particular question on this topic you want addressed or if you want copies of the information from 101 feel free to contact the firm at **class@evict.net**. We also are available for private classes and training on selected topics for your company.