

# The Landlord's Lawyer

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*Wiles & Wiles*

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## Welcome From the Managing Partner

Dear friends,  
Welcome to the second edition of the Wiles & Wiles newsletter, *The Landlord's Lawyer*. I hope that you find it informative and helpful in your daily work of managing properties. This issue has a continuation of our series in dealing with tenants and leases written by Susann Estroff, our senior associate who works very closely with many of our clients handling bankruptcies and tenant defaults. We rely on her to handle many of the challenges that arise on a day-to-day basis.

the need for more staff to ensure that Wiles & Wiles continues to be the preeminent commercial property firm in Metro Atlanta. To this end we have hired Brent Stamps, a young attorney who received his undergraduate degree from Vanderbilt and his law degree from Georgia State. Before joining Wiles & Wiles, Brent was clerk to Cobb County Superior Court Chief Judge Robert Flournoy. Also joining the firm is Kelly Shaw. Kelly is a paralegal who has worked in the field for over three years. She formerly worked for Beloin & Associates, LLC. specializing in title insurance litigation. We are excited to have Brent and Kelly working with us.



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A new feature that I hope you will find helpful in this issue is, *The Paralegal's Perspective* by Vic Newmark. Vic has been working as a paralegal for over 10 years and is currently studying to obtain his law degree. Vic is without a doubt one of the best in the field and a valuable member of our team.

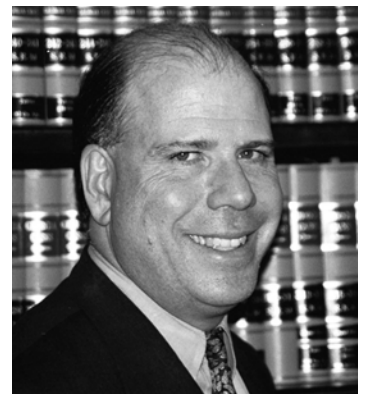
As for our firm, we are experiencing a lot of positive changes. Many of you already know that we have moved our offices to a new location and already needed to expand our space. With new business growth also comes

For those of you wondering about golf, we will host the 10<sup>th</sup> Annual Wiles & Wiles Golf Tournament in September 2001. As soon as we have a date, we will let you know. Jack, Jason, our associate working primarily in litigation, Susann and I will be attending the ICSC convention coming up in Las Vegas in May. We hope to see you there.



Sincerely

John Wiles



# **PLANNING AHEAD TO AVOID TENANT PROBLEMS –**

## **PART 2** by Susann Estroff

When it is time for the tenant to sign the lease, the landlord should, unfortunately, be thinking of the possibility that at some time during the tenancy, the tenant will be in monetary default of the lease and the landlord will have to resort to somewhat drastic measures to collect amounts owed. The more parties liable for the tenant's debt, the better the possibility of collection. For this reason, the landlord should always consider requiring a personal guarantee of the lease agreement.



### **Guarantees - Who Should Sign the Lease?**

If there is a corporate tenant, it is always advisable to make sure an individual guarantees the lease. Likewise if the individual who will be the tenant has questionable credit, it is a good idea to get somebody else liable as a guarantor of the lease. A guaranty is a contractual obligation just like the lease, and the terms of a guaranty may be negotiated, changed and tailored to fit each situation. It is just as important to conduct a credit check on a guarantor as it is on an individual tenant. The more guarantors, the better chance the landlord has of collecting sums owed. To this end, the landlord should require a guarantor to complete an information form similar to the tenant's.

It is imperative that the guaranty is executed correctly and that it contains certain provisions which are very valuable to the landlord. Make sure the guarantor's name, address and social security number are typed above or below the signature line, so it is easy to ascertain who the guarantor is. Make sure the signature is that of an individual in an individual capacity, and not in the capacity of an officer of a corporation. If there are multiple guarantors, make sure all guarantors sign, as the guaranty may not be valid with missing signatures, and the guaranty must state that liability is joint and several, giving the landlord the right to pursue one or more guarantors. The guaranty should reference the lease and any amendments, the date of the lease and amendments, and the guaranty should be executed contemporaneously with the lease and therefore have the same date as the lease so as to avoid problems with consideration. The guaranty should be notarized or witnessed, so as to avoid an argument of forgery. The obligations of the guarantor(s) should include all the performance of all obligations of the lease and payment of all charges that are due pursuant to the lease agreement, including but not limited to any interest, late charges and attorneys fees due. The guaranty should acknowledge that the landlord and the tenant have the right to amend, extend and renegotiate the lease without requiring notice to the guarantor. The guaranty should also guaranty performance under the lease, not just collection of past due amounts, and give the landlord the right to pursue the guarantor without having to exhaust its remedies against the tenant first. The landlord should not be required to give notices of default to the guarantor. If all of the foregoing are included in the guaranty of lease, there is a greater probability that nothing will occur so as to discharge the guarantor from liability.

### **Security Deposit - How Much?**

A landlord should always collect a security deposit from every tenant. If the landlord thinks that the tenant is a slight financial risk, it is not unreasonable for the landlord to ask for an amount equal to two or three months' rent as a security deposit. Certainly, it is advisable to always require the tenant for an amount equal to one month's rent as a security deposit. While there is the risk that a tenant will attempt to treat the security deposit as it's last month's rent, the benefits of retaining a sizable security deposit far outweigh the burdens.

Additionally, if the tenant becomes a financial risk during the tenancy (for example, fails to pay rent for several months), it is not unreasonable for the landlord, as a part of a settlement agreement with the tenant, to demand that the security deposit be increased to equal the value of several months' rent for the landlord to fall back on in the event of another default. In all cases, the lease should give the landlord the right to apply the security deposit to a default during the term and demand a replacement from the tenant with a commercial lease, the landlord may be willing to waive the requirement of a security deposit but instead will require the issuance of a letter of credit to the benefit of the landlord, and incorporate specific lease provisions that allow the landlord to draw down on the letter of credit in the event of a tenant default.

Good news for landlords whose tenants file bankruptcy is that the Bankruptcy Court will allow the landlord to set off the security deposit against any pre-petition debt of the tenant. 11 U.S.C. § 533, In the Matter of Lacklow Brothers, Inc., 22 B.R. 1022 (BC S.D. Fla. 1982).



IN THE NEXT NEWSLETTER: Planning Ahead Part 3 – Making sure the tenant returns the premises in the same condition as first leased.

## THE LANDLORD'S REMEDIES WHEN THE TENANT FILES BANKRUPTCY – PART 1 by Susann Estroff

Unfortunately, it is not unusual for an individual or corporate tenant to seek relief under Chapter 7 (liquidation), 11 (reorganization) or 13 (wage earner) of the United States Bankruptcy Code while they continue to occupy the leased premises. Bankruptcy laws are codified in Title 11 of the United States Code and the Bankruptcy Rules, as well as provisions of the Judicial Code relevant to bankruptcy and selected provisions of title 18 of the United States Code regarding Bankruptcy Crimes and Immunity Provisions.

Typically, a bankruptcy filing is usually preceded by the tenant failing to pay rent for a period of time. A bankruptcy filing will automatically stay, or stop, any lawsuit or eviction proceeding which is pending against the tenant, and will almost certainly preclude the landlord from legally regaining possession of the leased premises until the Bankruptcy Court has given permission. The automatic stay provision can be found at 11 U.S.C. § 362. The automatic stay even applies if an eviction is occurring and the tenant informs you it has filed bankruptcy, the eviction must be discontinued immediately. Once the tenant files bankruptcy, the tenant is called the Debtor or Debtor in Possession.

### **Lifting the Automatic Stay**

If the tenant continues to occupy the leased premises without paying rent to the landlord, or if the landlord has litigation pending against the bankrupt person or entity which is scheduled for depositions or trial, the landlord may make a Motion to Lift the Automatic Stay pursuant to 11 U.S.C. § 362(d). Typically the party moving to lift the stay will file a Motion, serve it upon the Debtor, the Trustee and the Debtor's attorney and file the original with the Clerk of the Bankruptcy Court. The motion by the landlord (called the Movant) will set forth the facts surrounding the request for relief (for example, that the Debtor is a tenant pursuant to a lease dated mm/dd/yy, that the tenant has not paid rent since mm/dd/yy, that the Movant is prejudiced by the Debtor's use and occupation of the leased premises without paying rent, and Movant requests the stay be lifted in order to proceed with an action to evict the tenant). The fee for filing a Motion to Lift Stay, paid by the Movant, is \$75.00, recently raised from \$60.00. The Bankruptcy Court must set a hearing to be held within 30 days.

The landlord, the Debtor and the Trustee can agree to lift the stay so the landlord can legally regain possession of the premises, or so that a pending litigation may continue, and proceed with depositions, State Court hearings or trial. In this instance, the landlord can prepare a Motion to Lift the Stay, provide copies to the Debtor and Trustee, and the parties can agree to enter into a Consent Order, setting forth the factual situation and that the parties agree to lift the stay as to the landlord for the specific purpose stated. A Consent Order not only has the obvious advantage that the parties are already agreeing, saving time (and probably attorney's fees), but, additionally, there is no charge by the Georgia Bankruptcy Courts to submit a Motion to Lift Stay when it is submitted along with a Consent Order Lifting Stay.

### **Proofs of Claim**

The way a creditor asserts its right to a claim in the Bankruptcy is by filing 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 purposely 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.



IN THE NEXT NEWSLETTER: Assumption and rejection of leases by the tenant in bankruptcy.

*Watch for the 10th Annual Wiles & Wiles  
Golf Tournament, Coming Fall 2001*

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## Paralegal Perspectives

By Vic Newmark

### Why Do I Need The Lease?

Often times you will receive a phone call from one of the paralegals in our firm seeking what you may consider to be useless information. We might ask for copies of all correspondence from a tenant, copies of credit or lease applications from a tenant, copies of checks the tenant may have tendered to landlord to pay security deposit or rent and maybe even a copy of the lease itself. While it may seem that some of these items are trivial or do not seem relevant to the current problem, that is far from the case. As most property owners and managers know, the main reason that lawyers are engaged to assist an owner or property manager is that the tenant has, in some way, defaulted under the terms of his or her lease. This default generally involves the nonpayment of rentals.

One of the primary goals of our firm is to not only assist an owner or property manager in regaining possession of the leased

premises, but also to secure the repayment of past due rentals. To that end, the documents which we typically request are used in our firm's effort to not only secure possession of the premises but also payment of past due obligations. When we review our files, many factors are taken into account and are used to determine if in fact such past due rentals are collectible. The documents provided to us by you help us make decisions on whether the debt is collectible. By closely reviewing each document provided by you, we are able to do a number of things which assist in the collection of these past due obligations. Usually, a credit application or lease application will contain an individual tenant's full name, home address, and often times a social security number. With this information, we are able to obtain credit reports on individual tenants who are in default. As one might expect, a credit report is generally a good snapshot of an individual's financial condition, and it is also helpful in locating an individual's assets. Not only is personal biographical in-

formation concerning an individual tenant useful, but information concerning a corporate tenant is useful as well. Such items as a corporation's annual report filed with the Secretary of State's office may lead to useful information. In a typical landlord/tenant eviction situation, a corporate tenant's registered agent must be served with the dispossessory proceeding. In order to more easily locate the registered agent of the corporate tenant, information provided to us by you can help us find the corporation's registered agent or corporate officers. Importantly, if we are able to serve a corporate tenant's registered agent with the dispossessory, we generally will be able to obtain a money judgment against it. With the judgment we can often collect the money owed you.

In conclusion, the documents and information which our paralegals solicit from you all design to provide the most expedient and full relief allowed the landlord under the terms of the lease and at law.

