A Primer On Remedies For Landlord Defaults (With Sample Clauses)

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For every right, a remedy; for every wrong, a recourse?
Only if you knew what you were doing when you negotiated the lease.

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WHEN NEGOTIATING AND DRAFTING a lease for a tenant, it is particularly important to contemplate the consequences of a potential breach of the lease by the landlord. A variety of common law remedies are available to a tenant for a landlord’s breach; but, the best time to think about a landlord’s breach is before the lease is signed. A commercial landlord will seek contractually—and perhaps subtly—to minimize the tenant’s common law remedies. For its part, the tenant will want provisions in the lease ensuring the availability and adequacy of its remedies.

COMMON LAW REMEDIES • For a landlord’s breach, a tenant has a variety of equitable remedies. The tenant may also pursue an action at law for damages.
Equitable Remedies
Tenants may avail themselves of various equitable remedies for landlord defaults. Among these are:
• Rescission;
• Constructive eviction;
• Injunctive relief;
• Specific performance; and
• Declaratory judgment.

Rescission
If a landlord breaches a material term of a lease before the lease term commences, the tenant may seek to rescind the lease. See Restatement (Second) Of Property, Landlord and Tenant §§4.2 and 6.2 (1977 & Supp. 2003). In S&D Group, Inc. v. Talamas, 710 S.W.2d 680 (Tex. App. 1986), the court held that a sublessee could rescind because the sublessor failed to deliver possession. In Draper Mach. Works, Inc. v. Hagberg, 663 P.2d 141 (Wash. Ct. App. 1983), however, a tenant waived its right to rescind for landlord's failure to deliver possession when the tenant occupied a portion of the premises. In Blanc's Cafe v. Corey, 188 P. 759 (Wash. 1920), a tenant maintained an action for ejectment against the landlord because the landlord failed to deliver possession in time. See also Crown Plaza Corp. v. Synapse Software Sys., Inc., 962 P.2d 824 (Wash. Ct. App. 1997).

Constructive Eviction
After commencement, a tenant may seek to terminate a lease on a theory of constructive eviction. For example, the tenant may sue for constructive eviction if the landlord has failed to cure a misrepresentation of an environmental condition. Heritage on Lanier, Inc. v. Akins, 454 S.E.2d 172 (Ga. App. 1995). In Akins, the tenant counter claimed for rescission of the lease based on the landlord's misrepresentation of the environmental condition of the premises. The court remanded the question to the trial court for further fact finding. See also Zwerdling v. Zack, 202 A.D.2d 577, 609 N.Y.S.2d 259 (1994). A tenant may seek constructive eviction if the a landlord fails to provide an environmental audit and the premises turn out to be contaminated. See Fla. Atlantic Marine, Inc. v. Seminole Boatyard, Inc., 630 So. 2d 219 (Fla. Dist. Ct. App. 1993) (tenant seeks rescission of the lease and damages for the landlord's failure to provide the tenant with an environmental audit as required under the lease, and the landlord's contamination of the premises).

Injunctive Relief
A tenant may petition for injunctive relief for continuous or repeated acts creating a nuisance. See 49 Am. Jur. 2d Landlord and Tenant §
A tenant may also obtain injunctive relief for other types of breaches of the covenant of quiet enjoyment, including the following:

- **Interference with tenant’s alterations and sublease**, if permitted under the lease; see *Med Mac Realty Co., Inc. v. Lerner*, 547 N.Y.S.2d 65 (N.Y. App. Div. 1989);
- **Using a self-help remedy to block the tenant’s customers’ access to the premises during a rent dispute**; see *Am. Warehousing Servs., Inc. v. Weitzman*, 523 N.E.2d 1082 (Ill. Ct. App. 1988);
- **Enforcement of the landlord’s remedies until the rights of parties can be settled, but only if requested before expiration of the cure period for the tenant’s alleged default**; see *S.E. Nichols, Inc. v. Am. Shopping Ctrs., Inc.*, 495 N.Y.S.2d 810 (N.Y. App. Div. 1985);
- **Demonstrated inability to cure a default within the prescribed 30-day period**; see *Long Island Gynecological Serv. v. 1103 Stewart Ave. Assocs. Ltd. P’ship*, 638 N.Y.S.2d 959 (N.Y. App. Div. 1996);
- **Constructing a restaurant in a shopping center parking area when the restaurant would interfere with tenant’s nonexclusive parking easement**; see *Madigan Bros., Inc. v. Melrose Shopping Ctr. Co.*, 463 N.E.2d 824 (Ill. App. Ct. 1984);
- **Granting an access easement across the common parking area to a fast food restaurant**; see *Pacemaker Food Stores, Inc. v. Seventh Mont Corp.*, 453 N.E.2d 806 (Ill. App. Ct. 1983);
- **Turning a portion of a common parking area into restricted parking for another tenant**; see *Mut. of Omaha Life Ins. Co. v. Executive Plaza, Inc.*, 425 N.E.2d 503 (Ill. App. Ct. 1981);
- **Obstructing access to premises from a major road adjacent to the premises**; see *Checker Oil Co. v. Harold H. Hogg, Inc.*, 380 A.2d 815 (Pa. Super. 1977); and

### Specific Performance

A tenant may also seek specific performance compelling landlord to cure landlord’s breach of contract to lease. In *Ryan v. Stanger Inv. Co.*, 620 S.W.2d 505 (Tenn. Ct. App. 1981), for example, the court found that a contract to lease was specifically enforceable. *Wetherbee, Ltd. v. Allred*, 969 S.W.2d 756 (Mo. Ct. App. 1998).

Enters., Inc., 210 S.E.2d 809 (Ga. 1974), in contrast, a court found a tenant’s right to make repairs and recover costs and its right to recover damages were adequate remedies at law. Likewise in Continental & Vogue Health Studios, Inc. v. Abra Corporation, 120 N.W.2d 835 (Mich. 1963), a court refused to grant specific performance, finding a tenant’s remedies at law to be adequate.

A tenant may also seek specific performance for a landlord’s breach of a restrictive covenant. For example, in N.H. Donuts, Inc. v. Skiptaris, 533 A.2d 351 (N.H. 1987), a court ordered a landlord to remove a building that blocked the premises from a view of the highway, in violation of a recorded covenant.

Declaratory Judgment

Finally, a tenant may petition for a declaratory judgment. In Sun Ins. Services, Inc. v. 260 Peachtree Street, Inc., 385 S.E.2d 127 (Ga. Ct. App. 1989), a tenant obtained a declaratory judgment finding that asbestos removal was the landlord’s obligation to be performed before the tenant began the renovation work allowed by the lease. In Times Square Stores Corp., Inc. v. Bernice Realty Co., Inc., 529 N.Y.S.2d 148 (N.Y. App. Div. 1988), a court held a landlord’s refusal to cooperate with the tenant’s expansion of the building to be unreasonable, so the court ordered the landlord to sign an application for a new certificate of occupancy. See also, Middle Village Assocs. v. Pergament Home Centers, Inc., 708 N.Y.S.2d 840 (N.Y. Sup. Ct. 2000).

Legal Remedies

Legal remedies, as opposed to equitable remedies, include the enforcement of any liquidated damages agreement and pecuniary damages for any breach of the landlord’s obligations.

Action For Damages

A tenant may enforce a liquidated damages clause for the landlord’s failure to deliver possession. See 49 Am. Jur. 2d Landlord and Tenant §501 (1995); Moses v. Autuono, 47 So. 925 (Fla. 1908); Omohundro v. Ottenheimer, 127 S.W.2d 642 (Ark. 1939); Boltz v. Crawford & North Aves. Theatre Co., 13 N.E.2d 844 (Ill. App. Ct. 1938). The tenant may also seek money damages for any other breach of the landlord’s obligations.

Measure Of Damages

On the subject of the measure of damages, the Restatement (Second) of Property, Landlord and Tenant §10.2 (1977 & Supp. 2003) is highly instructive. See also, Eugene L. Grant, Disturbing Concepts: Quiet Enjoyment and Constructive Eviction in the Modern Commercial Lease, 35 Real Prop. Prob. & Tr. J. 57 (2000); Eugene L. Grant, Avoiding the Risks: Subrogation, Indemnification, and Exculpation in the Context of Commercial Leases, 21 Rel. Est. L. J. 255 (1993); Richard M.