

## The Tenant's Deposit of Rent into the Court Registry is Only Half the Battle

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All landlords have one primary focus: the receipt of rent on time. Commercial landlords whose tenants are in default will usually seek eviction. Florida law provides a seemingly powerful means to protect the landlord against a tenant who persists in refusing to pay rent while the eviction lawsuit is pending and wishes to remain in possession. Florida Statute §83.232 requires a tenant to deposit rent determined to be due into the court registry. However, the statute includes a subtle provision that can unfairly prevent a landlord from actually collecting its rent during an eviction action. Florida Statute §83.232, generally recognized as a valuable tool for landlords, requires a tenant in an eviction action to pay into the court registry the amount of rent alleged in the complaint as unpaid, or if contested, the amount determined by the court. If a tenant fails to pay that amount, the tenant's defenses regarding possession are deemed absolutely waived and the landlord is entitled to immediate possession. The statute was "designed to protect a commercial landlord from irreparable harm where a tenant holds over during eviction proceedings without paying rent. *Famsun Invest, LLC v. Therault*, 95 So.2d 961 (Fla. 4th DCA 2012). The legislative history reveals that the statute was "intended to remedy the inequity of allowing the commercial tenant to litigate an eviction

claim rent free." See, A Report on Nonresidential Landlord Tenant Law, Florida Senate Committee on Judiciary, January 1993. However, the statute only provides limited means for a landlord to withdraw the tenant's rent from the court registry. Fla. Stat. §83.232 provides that a landlord may apply to the court for disbursement of the funds deposited "if the landlord is in actual danger of loss of the premises or other hardship resulting from the loss of rental income."

There are scant cases interpreting what constitutes "actual danger of loss of the premises." A well-capitalized landlord will have difficulty in proving "actual danger of loss of the premises." The typical commercial landlord should be able to carry the property during the lawsuit. Therefore, many landlords are left with satisfying the nebulous "other hardships" standard to obtain their rent if the eviction action becomes drawn out.

There is a dearth of case law interpreting "other hardship" under the current statute. The best guidance may emanate from a Florida Supreme Court decision interpreting a similar statute under condominium law. In *Pomponio v. The Claridge of Pompano*, 378 So.2d 774 (Fla. 1979), the Florida Supreme Court held that former Fla. Stat. §718.401(4), which governed the deposit of rent into the court registry under condominium law, was unconstitutional. In *Pomponio*, the defendant/lessees deposited rent with the court registry pursuant to Fla. Stat. §718.401(4). The plaintiff/lessors asserted

that the statute was unconstitutional because it limited the landlord's right to withdraw rent from the court registry only for payment of necessary expenses. The Florida Supreme Court agreed and held the statute unconstitutional because the contract contemplated receipt of rent and the statute violated the constitutional provision that prohibits any "law impairing the obligations of contracts."

The court reasoned that the "current use of court-retained rent moneys is an economic deprivation for which a landlord obviously has not bargained, producing erosion of value (at least in our persistently inflationary economy) which goes beyond mere inconvenience." The court noted that the condominium statute's authorization of withdrawals only for necessary expenses such as taxes, mortgage payments, and maintenance, was inadequate. The court reasoned that in this formulation "all other needs and desires of the lessor for its promised rent are wholly ignored."

To contrast the unconstitutional nature of the statute, the Florida Supreme Court analyzed the Florida Residential Landlord and Tenant Act's similar provision requiring payment of rent in the court's registry during the pendency of litigation.<sup>1</sup> The court noted that the landlord-tenant statute authorized the court to disburse to the landlord the funds on deposit upon a showing of "actual danger of loss of the premises or other personal hardship resulting from the loss of rental income from the premises."

The court then held that "in that [landlord-tenant] statute, the legislature has acknowledged that the consequences of rent detention may extend to a deprivation of sums needed for purposes other than the preservation of the controverted property." Subsequently, in *Cenvill Investors, Inc. v.*

*Condominium Owners Organization of Century Village, East, Inc.*, 556 So.2d 1197 (Fla. 4th DCA 1990), the court analyzed *Pomponio* and explained that the flaw in the condominium statute was that the lessor was permitted to withdraw amounts needed for maintenance, but not the lessor's "built-in profit."

Therefore it appears that the term "hardship" in the commercial landlord-tenant statute should be not limited to necessary expenses and should extend to the landlord's right to receive its "built-in profit." However, while landlords may assert this argument, the statute itself is not clear. Because the statute does not define "hardship" and there are few if any cases addressing that term, the legislature has placed a commercial landlord in an unreasonably difficult circumstance if it is involved in a lengthy eviction case.

The legislature would be well served to address this issue in the future to avoid this unintended consequence. In the interim, lawyers representing landlords should be aware of this issue and may seek to avoid it proactively by entering into direct agreements regarding the tenant's payment of rent especially if protracted litigation is anticipated.