A NEWSLETTER PUBLISHED BY BERDING & WEIL LLP

COMMERCIAL REAL ESTATE ALERT

AUGUST 2002

ADDRESSING THE NEEDS OF COMMERCIAL REAL ESTATE PROFESSIONALS

Commercial Unlawful Detainer Law

A Quick & Practical Guide

BY SCOTT W. SINGER, ESQ. AND PHILLIP H. STOERMER, ESQ.

ACTIONS IN UNLAWFUL DETAINER are brought by commercial Landlords against Tenants for two primary reasons: (i) Tenant's failure to pay Rent (including all charges due under the Lease); or (ii) Tenant's breach or failure to perform other obligations, covenants or conditions required by the Lease (e.g., maintain the Premises, violation of the permitted use, violation of an exclusive use provision, failure to provide an estoppel certificate or financial statements, failure to post or replenish a security deposit, abandonment, unconsented sublease or assignment, etc.). Unlawful detainer is appropriate for failure to pay Rent, or for any acts or omissions which result in a breach of Tenant's obligations under the Lease. Landlords are often times wary of the process, many having Tenants who have "beaten the system." The prosecution of any unlawful detainer is hyper-technical, fraught with areas for a savvy Tenant to take advantage of the system, and generally a trap for Landlords and their counsel who are not intimately familiar with the technicalities and procedure. However, if properly handled, an unlawful detainer action can often times restore possession of the Premises to a Landlord within 30 to 60 days of initially consulting an attorney. California Courts have specifically stated that it is their goal for 90% to 100% of all unlawful detainers to be disposed of within 30 days of the filing of the complaint, and 100% of all cases within 45 days[1]. By statute,

continued on page 2

Fire Sprinklers

Where There's Smoke...

BY: JEFFREY CEREGHINO, ESQ.

SINCE THE TURN OF THE LAST CENTURY, building owners have employed fire sprinklers to protect buildings and the lives of those who use the buildings. In the 1900's fire sprinklers were a novel and exciting innovation; now, they are ubiquitous. Most of us rarely, if ever, really notice fire sprinklers in buildings. They are just there, like doorknobs and light switches. We expect fire sprinklers to work when called upon in an emergency. They exist for one purpose and one purpose only—to put out fires. Until very recently, the concept that something so standard, so simple, and so presumptively reliable, may not operate in a fire was inconceivable. In the past few years the presumptive reliability of fire sprinklers has been seriously questioned. Fire sprinklers have been at the forefront of not one but two Consumer Product Safety Commission (CPSC) recalls. Fire sprinklers in "wet" systems are designed to "activate" under certain temperatures and under certain water pressure (PSI). The water in the system is contained by an activation mechanism and a water-tight seal. There are several different types of activation mechanisms, all designed to activate when temperatures reach 150 degrees. A common mechanism is a glass bulb. The bulb contains a liquid that, like Mercury, expands dramatically when heated. As the temperature rises the liquid expands, the glass bulb shatters and the plunger falls

continued on page 11

columns

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Unlawful Detainer Law / continued from page 1

the trial must be conducted within 20 days of Landlord's filing of a request for trial setting[2]. In our experience, almost all unlawful detainers should be disposed of within 60 days of filing of the complaint if the Landlord and its counsel diligently prosecute the action. The summary nature of the proceeding is highly beneficial to a Landlord in accomplishing its typical goal of regaining possession of the Premises on an expedited basis.

1. Nature of the Action.

An action in unlawful detainer is only appropriate if the Landlord is seeking possession of the Premises[3]. If at any time during the action, possession of the Premises is no longer at issue for any reason, the Court will automatically convert the case from an unlawful detainer action to a regular action for damages. If a case loses its unlawful detainer designation, it is no longer entitled to priority, and will be placed on the Court's regular calendar (often in excess of one year to trial). Unlawful detainer is a summary proceeding because public policy mandates that Landlords be entitled to regain possession of their premises expeditiously in the case of Tenant defaults. However, this time line is easily delayed if any portion of the case is troublesome, including the service of the 3-day notice, or more importantly, the complaint, lengthy discovery, law and motion practice, demurrers, motions to strike, summary judgment, and other mechanisms or strategies used by Defendants.

2. Limitations to Unlawful Detainer.

First, it could be noted that if the Landlord is not seeking an order restoring possession of the Premises to it, then an unlawful detainer action may not be maintained. Second, the only damages available to a Plaintiff in an unlawful detainer action are "Rent" as well as certain attorneys' fees and costs (if provided for in the Lease), interest, late fees, and statutory damages[4]. However, this limitation is not as broad as it appears on its face. As long as the Lease contains a provision which captures all monetary Lease obligations as "Additional Rent" or defines "Rent" in the default section of the Lease to include such sums, a Landlord can collect these amounts in an unlawful detainer action. Therefore, items such as operating expenses, taxes, or common area maintenance charges can be collected by means of unlawful detainer as long as the Landlord's Lease form is properly drafted. Third, an unlawful detainer action can only seek to collect Rent for a period of one year measured from the date of service of the 3-day notice (a Plaintiff can sue for delinquent Rent in excess of one year, but the action is in the form of a traditional breach of contact action, not an unlawful detainer[5]). As a general rule, overstatements of the amount owed in a 3-day notice can serve to invalidate the 3-day notice. However, the recent case of *Levitz Furniture Co. vs. Wingtip Communications, Inc.*, (2001) 86 CA4th 1035, allowed a Landlord to serve a 3-day notice seeking damages in excess of one year, and the Court did not invalidate the 3-day notice. This court found that plaintiff's overstatement was *de minimus*, and the case is likely limited to its specific facts. It is not advisable to include any amount of Rent more than one year delinquent in the Landlord's 3-day notice. Lastly, a Defendant in

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1 While it is possible to get to trial within 30 days of the unlawful detainer filing of the complaint, it is likely to take up to 60 days to resolve an unlawful detainer from the date the client retains the lawyer. Numerous time-consuming activities take place prior to the filing of the complaint, i.e., lease review, preparation of 3 (or more) days' notice, waiting for the cure period, preparation of the complaint and client consultation. Numerous time- consuming activities also take place after the trial, including the enforcement of the judgment, retaining and communicating with the executing sheriff, as well as obtaining the required notices of the sheriff and general enforcement of the judgment. See Standards of Judicial Administration; see also CRC App. Div. 1, §2.3(d).

2 Trial shall start no later than the 20th day following Plaintiff's request for trial setting. (*C.C.P.* §1170.5). The request for trial setting is generally filed with the Court after the case is at issue and the parties have conducted their discovery.

3 *C.C.P.* §1161.

4 Only those damages directly related to unlawful detention are recoverable (*Vasey vs. Cablin Dance Co., Inc.* (1977) 70 CA3d 742).

5 *C.C.P.* 1161(2).

an unlawful detainer action cannot file a cross-complaint nor can the Tenant seek to bring a third party into the unlawful detainer action by means of the filing of a cross-complaint.[6] The Tenant can only answer the complaint, allege certain limited defenses, and defend itself against the unlawful detainer action.

3. The Procedure of the Unlawful Detainer Action.

A. Preparation and Contents of the 3-day Notice.

First and foremost, the Landlord and its counsel must check the Lease to ascertain the length of notice which must be given, and to whom the notice must be given. If the Lease is silent, 3 days' notice to pay Rent or quit is sufficient (*C.C.P.* 1161(2)). If a different notice period is provided for in the Lease, notice of that length of time must be provided before the Landlord can claim a forfeiture of the Lease. Tenant's lawyers often negotiate longer time periods for notice of defaults, so the Landlord and its counsel must be careful to check the notice and default provisions to ensure that proper notice is given to the Tenant.[7]

Note that fatally defective 3-day notices can invalidate Landlord's attempts to evict the Tenant, even as late as the day of trial.

The 3-day notice must contain the following basic items to be effective: (i) a thorough description of the Premises (refer to the Lease); (ii) a statement of the amount due or nature of breach; (iii) a declaration of forfeiture; and (iv) the name, address, title, and phone number of the person authorized to accept the Rent payment, or notification that Tenant has cured the defaults, and the days and hours the person will be available to accept such payments (or the financial institution's name and address, or information regarding an electronic funds transfer).

If the notice is to cure a breach, the alleged breach must be stated with specificity (i.e., failure of Tenant to pay the Pacific Gas and Electric bill for the period from May 1, 2002 though May 31, 2002). If the notice is for non-payment of Rent, then the exact amount must be stated (or in the alternative a reasonably estimated amount pursuant to *C.C.P.* 1161.1(a)). If the Landlord desires to regain possession of the Premises (presumably the Landlord does want to regain possession), the 3-day notice must state that in the event the Tenant fails to cure the default within the time limits prescribed, then the Landlord will declare a forfeiture of the Lease. In other words, the Lease will be terminated as a matter of law upon the expiration of the cure period provided in the notice;[8]

Note that fatally defective 3-day notices can invalidate Landlord's attempts to evict the Tenant, even as late as the day of trial. The defects in the 3-day notice can be raised by Defendants in a motion to quash or as an affirmative defense to the complaint. It is imperative to carefully draft and review the 3-day notice for compliance with all then applicable laws.

B. Service of the 3-day Notice.

Service of the 3-day notice can be accomplished by one of two methods, both of which are authorized and acceptable. The preferable method of service is personal service. This generally requires that a process server, property manager, or other person personally hand a copy of the 3-day notice to the Tenant (presumably the person who signed the Lease). If the Tenant is not available, or if the Tenant is not a natural person, substitute service is permissible. Substitute service involves leaving a copy of the notice with a person of suitable age and discretion at the Tenant's personal residence or the Premises, and mailing a copy to the residence of the Tenant. We recommend mailing by means of certified mail, return receipt requested. However, substitute service is only permitted if the Tenant is "absent" from his or her residence or usual place of business. A thorough Landlord will require the declaration of the process server that the process server tried on 3 separate occasions to serve the 3-day notice, and that the Tenant was absent. Only if the Landlord cannot personally serve the Tenant, or substitute serve the Tenant, may the Landlord resort to the "Nail and Mail" procedure. The 3-day notice (or applicable notice) must be (i) affixed to the Premises in a conspicuous place; (ii) delivered to the person who resides or conducts business there; and (iii) mailed to the Tenant at the Premises (and to be safe, to his or her home address if ascertainable). We recommend that all notice mailing be accomplished by certified mail, return receipt requested. We also recommend faxing a copy to the Tenant's business. The more efforts a Landlord shows to accomplish actual delivery of the notice to the Tenant, the less likely the Court will quash the notice, or uphold a defense of defective service at trial.

continued on page 12

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6 *Knowles v. Robinson* (1963) 60 C2d 620, 626-627.

7 In the case of non-monetary defaults, the negotiated cure period will likely be greater than 3 days, and may provide for an even further cure period for those items which may take longer to cure.

8 If the 3-day notice fails to declare a forfeiture, under certain circumstances, the Tenant may proceed to trial, be found by the jury to owe Rent, pay the amount of the judgment, and possession will be possibly restored to the Tenant.

Five Obstacles to the Effective Use of Development Agreements

BY DAVID J. LARSEN, ESQ

Many of you are associated with commercial projects that have been approved through use of a "development agreement." Development agreements are contracts negotiated between the project applicant and a local entity, which establish allowable land uses for the project. They are typically associated with large-scale mixed use developments, but may also be applicable to smaller commercial and residential ventures. The purpose of this article is to discuss five common obstacles to the effective use of development agreements, and recommended ways of overcoming them.

Defining Characteristics of Development Agreements:

1. Greater flexibility exists concerning allowable land uses, because developers are not required to comply with local zoning standards and regulations, as long as their projects are consistent with the local entity's general plan (and any applicable specific plan). This affords a great deal of latitude in approving new and creative concepts and designs, or contingency plans allowing the developer to react to changing market conditions, which might otherwise run afoul of applicable zoning standards and regulations.

2. Greater exactions and conditions by the local entities are possible because the approval process involves an agreement negotiated between the parties, whereby local entities are free to negotiate project exactions or conditions that they could not normally impose as conditions of project approval. In the event the project applicant does not agree to them, the local entity may be able to apply pressure on the applicant to reconsider the entity's proposed exactions or conditions, by threatening not to approve the development agreement, in which case traditional zoning standards and regulations apply.

3. Greater assurance that approved projects can be built is provided by development agreements. One of the challenges project applicants face without development agreements is that their projects must meet regulatory standards in effect at each stage of the development process. This can result in project applicants being subject to new standards or regulations, even after final approvals, and even though new standards or regulations may preclude construction of some or all of the project. By contrast, once a development agreement is approved, developers obtain immediate "vested rights" to complete proposed projects as approved.

Project proponents that are worried their project may be derailed by a potential building moratoria, ballot measure or changes in the make-up of the legislative body that has approved the project may be especially interested obtaining immediate vested rights.

Five Obstacles and Recommended Responses

Obstacle # 1:

The local entity wants to remain "at arms length" from the developer. In some instances, the local entity may feel uncomfortable negotiating special rules to apply to a particular development, for fear that constituents will allege favoritism or perceive the entity as being inappropriately aligned with a particular developer. Such discomfort may make the entity less willing to entertain creative land use concepts or to afford the developer benefits unavailable to others.

Recommended Response:

Do your "due diligence" up front, by meeting with local entity staff, elected officials and community leaders early and often, to determine how your proposal will be received.

The following are important questions. Has the entity approved development agreements in the past? Does your proposed project advance planning goals of the community? Are there third party "stakeholders" whose interests may be affected by your proposal?

Obstacle # 2

The local entity may desire unrealistic conditions and exactions. The local entity may have unrealistic expectations concerning what developer exactions and conditions should be negotiated as part of the development agreement. As a result, parties with fundamentally different expectations may fail to reach agreement even after protracted negotiations.

Recommended Response:

Determine in advance what the entity's past practice has been with respect to exactions and conditions. Has it insisted that developers pay for expensive public improvements and infrastructure before it agrees to the terms of a development agreement? Has it failed to reach agreement over such issues during past development agreement negotiations?

Meet with local entity staff before beginning to negotiate the terms of an agreement and openly discuss this issue, so that the parties can ascertain as soon as possible whether their respective expectations concerning developer exactions and conditions are mutually attainable.

Obstacle # 3

The lack of effective negotiators. Many local entities pay only lip-service to the importance of training staff to effectively negotiate. Similarly, while the development community enters into a number of negotiations with respect to land use entitlements, not all developers appreciate the need to adopt effective methods of negotiation. The potential lack of effective negotiators may be the single greatest impediment parties face.

Recommended Response:

Fundamentally, it is important to decide how the parties intend to reach consensus. Modern commentators advocate the practice of agreeing in advance to the use of synergistic rather than traditional methods of negotiations. They suggest, for example, using negotiators who will share the parties' respective "interests" (e.g., what they fundamentally wish to accomplish or avoid) rather than haggle over pre-determined "positions;" acquire a real (e.g., empathetic) understanding of what the other party needs; and use brainstorming techniques to develop "out-of-the envelope" options which can be reduced to a "real-world" list of viable, creative resolutions.

Ironically, local entities and members of the development community alike, sometimes feel that these new approaches are a passing fad or waste of time. In fact, empirical studies show they can save you precious time, and a great deal of money.

Obstacle # 4

Who should draft the development agreement and when the drafting should occur are important questions. It may be a temptation to allow the local entity's attorney to draft the development agreement, so that you can avoid paying your land use attorney a handsome sum to do so. On the other hand, it is commonly accepted in the legal community that the attorney responsible for drafting an agreement will gain a better appreciation for the intricacies and nuances involved in the underlying transaction.

As far as when the agreement should be drafted, many parties draft multiple iterations of an agreement as negotiations proceed. This existence of tangible evidence that the parties are making progress may be comforting. However, paying an attorney to draft forty or fifty iterations of a lengthy development agreement, can be exceedingly expensive.

Recommended Response:

It is probably a good idea for the parties to request an initial draft of a development agreement, so that everyone is aware of the intended form and standard provisions. It is also a good idea to insist that your attorney do the drafting.

However, it is generally not a good idea to have multiple drafts of the agreement prepared as negotiations proceed. Rather, the parties to the negotiations ought to spend whatever time is necessary to flush out the "deal points" before asking your attorney to draft a close-to-final agreement. A good way to do this is to keep a running outline of the deal points the parties have conceptually agreed to, and provide your attorney with copies.

Obstacle # 5

Lenders may have concerns that unfulfilled obligations in a development agreement can put their security at risk. Assuming the developer's successors-in-interest are bound by the development agreement, there may be multiple opportunities for unfulfilled obligations to jeopardize the lender's security.

Recommended Response:

One way to address this issue is to incorporate into the development agreement a provision indicating that upon the completion of developer obligations for a particular phase of development, the local entity will issue a "certificate of satisfaction" evidencing same. To the extent there are ongoing obligations, or obligations that transcend physical boundaries of a particular phase, the issuance of such certificates may be problematic. However, the issue ought to be raised and addressed as part of the negotiations.

Summary

Development agreements can be a powerful arrow in a developer's land use entitlements quiver, if steps are taken to address potential obstacles in an effective manner. Paying attention to the five obstacles discussed above, will be a good step in the right direction. BW

Note: For more information about development agreements, you may wish to order a copy of the recently published "Development Agreement Manual: Collaboration in Pursuit of Community Interests" written by David J. Larsen for the Institute of Local Self-Government, which is the research arm of the League of California Cities. Contact: **Maree Kingen** at Berding & Weil, LLP: 925/838-2090.

Subleasing:
The Master Landlord's Perspective

BY SCOTT W. SINGER, ESQ

IN A CONTINUING SERIES OF ARTICLES ON SUBLEASING, Mr. Singer examines some of the major concerns to a Landlord in a subleasing transaction. The March issue of the Commercial Real Estate ALERT addressed subleasing from the Subtenant's perspective, and is available on-line at **www.berding-weil.com**. The next issue of the ALERT will focus on the Tenant perspective in the subleasing transaction.

Commercial subleasing for a Landlord is a complex process involving a thorough examination of the original Lease and the Sublease document. The Landlord must also consider issues such as its consent, the current creditworthiness of the Tenant and the Subtenant, the use proposed by the Subtenant, recognition/attornment of the Subtenant, and even non-distubance by its lender(s). Because the Landlord lacks privity of contact with a potential Subtenant, and due to the complex issues present, the Landlord must exercise extreme caution in drafting the original Lease, reviewing a potential Sublease, negotiating and drafting the consent, negotiating and drafting the recognition agreement, if applicable, and participating, as an intermediary between the Subtenant and the Landlord's lender, in the negotiation of the non-disturbance agreement.

This article examines several of the more important aspects of a potential Sublease transaction from the Landlord's perspective. The following discussion is not exhaustive, but instead addresses some of the major issues of importance to a Landlord.

1. Consent vs. Recognition.

Commercial Landlords must be cognizant in their drafting of Sublease documents of the difference between consenting to the Sublease and recognizing the Sublease. If a Landlord consents to the Sublease, it has given its permission for the original Tenant to enter into a Sublease with the Subtenant. Most Leases contain language that the Tenant can transfer its interest in the Lease with Landlord's prior written consent, which consent shall not be unreasonably withheld. It is not coincidental that this language is found in almost all Leases. *Civil Code* Section 1951.4 provides that a Landlord can continue a Lease after default, and seek Rent for the term of the Lease, without any mitigation obligation, as long as the Lease provides that the Landlord will not unreasonably withhold its consent to a Sublease. Recognition on the other hand is a term of art, where a Landlord agrees to recognize a Sublease. Basically, the Landlord and Subtenant agree to be bound by the terms of the Sublease, as modified by the Master Lease, as if they had been original parties to the Sublease. Recognition attempts to provide for a direct contractual relationship between Landlord and Subtenant where the Tenant defaults under the Lease. Recognition is a situation where the Landlord agrees to recognize the Subtenant and the Sublease. This language is properly incorporated into the Master Lease or, in the alternative, may be the subject of negotiation in a separate Recognition/Attornment Agreement negotiated in conjunction with the Sublease, or part of the Master Landlord's Consent document.

2. Landlord's Consent Terms and Conditions.

(a) Consent to a Current Sublease Not Consent to Any Further Transfer. Landlord should ensure that in both the original Lease form and the Master Landlord's consent that the consent to the Sublease does not operate as a consent to any further subletting or assignment. The Landlord must ensure that its consent is required for any further assignment or subletting. This is essential to a Landlord to control the use of the Premises, and to ensure the proper tenant mix, suitability of a proposed use for the Premises, and the creditworthiness of a Subtenant.

(b) Landlord Not Bound by the Sublease. While the Landlord is willing to provide its consent, it should not be bound to the terms, provisions, covenants, and conditions contained in the Sublease. In the alternative, this may be an appropriate place to discuss recognition.

(c) Limitation of Subtenant's Rights. The consent form should provide that no rights are granted to the Subtenant under the Sublease that are greater than those granted to the Sublandlord under the original Lease. This limits the Landlord's obligations to those stated in the original Lease.

(d) Subtenant's Agreement to Perform Sublandlord's Obligations under the Master Lease. Commercial Landlords should insist that the Subtenant agree to perform all obligations of the Master

continued on page 7

Lease. Typical Subleases incorporate the Master Lease. However the consent should expressly state that the Subtenant agrees to perform all obligations of the Sublandlord under the Master Lease. The Landlord's counsel should be careful in its review of the Sublease to ensure that the Master Lease is properly incorporated, and that specific sections are carved out that are inapplicable. The process of carving out certain portions of the Master Lease is complicated, time consuming, and paramount in obtaining an accurate and acceptable Sublease.

(e) Sublandlord and Guarantors Remain Fully Liable under the Master Lease. One of the most important provisions of the Master Landlord's consent is that the Sublandlord and its guarantor (if any) remain liable for all obligations under the Master Lease, and that Sublandlord is responsible and liable for the performance of all obligations under the Master Lease, including the payment of Rent and other sums due under the Lease for the entire term of the Lease, as extended. As a matter of law, the Sublandlord remains liable in a Sublease transaction; however, it is essential to emphatically state this in order to avoid later confusion or dispute. A Guarantor's consent should be sought, notwithstanding any provision of the Guaranty Agreement that Guarantor's consent is not required.

The process of carving out certain portions of the Master Lease is complicated and time consuming...

(f) Default by Sublandlord or Subtenant As a Default of the Master Lease. The Landlord must be certain that in the case any obligations of the Lease are not met, whether due to acts or omissions or either the Sublandlord or Subtenant, Landlord is entitled to exercise all rights provided by the Lease and provided by law, including the right to terminate the original Lease and seek the eviction of either or both parties.

(g) Landlord Not Bound to Greater Obligations Than Provided in the Master Lease. Landlords should ensure that they are not bound to any greater obligations and/or responsibilities than those contained in the Master Lease. This is done in two ways: (i) a careful review of the proposed Sublease, and (ii) incorporation of language to that affect in the Master Landlord's Consent.

(h) Landlord's Option to Recognize Sublease. A strongly positioned Master Landlord's Consent will provide that in the case of a Sublandlord default, the Master Landlord has the option, in its sole discretion, of recognizing the Sublease. If the Master Landlord refuses to recognize the Sublease, it is thereafter entitled to exercise all rights permitted by law against the Subtenant to regain possession, and seek monetary damages. A sophisticated Subtenant will negotiate a set of criteria under which the Landlord is obligated to recognize the Sublease in the event the Sublandlord defaults under the Lease, or may insist in a Tenant's market, that recognition is automatic in the event of Sublandlord's default. This provision of the Master Landlord's Consent may be highly negotiated by the Subtenant in order to ensure its continued occupancy in the event the Sublandlord defaults under the Master Lease. The amount of negotiation that one might expect to encounter will depend upon the sophistication of the Subtenant. A Landlord must also carefully review the Sublease to ensure that it does not require recognition in the event of the Sublandlord's default.

(i) Insurance/Indemnity Requirements. Master Landlord's consent should include provisions requiring that the Subtenant obtain insurance in the amounts and coverages required under the Master Lease, and name both Landlord and Sublandlord as additional insureds.Furthermore, while the Master Lease is incorporated into the Sublease, it should be made clear in the consent that the Subtenant will indemnify both the Master Landlord and Sublandlord for all liabilities stated in the Master Lease.

(j) Excess Rents. Both the Lease and the Landlord's consent should contain a provision regarding the payment to Landlord of any Rents payable by Subtenant to Sublandlord in excess of the Rent under the Master Lease. Landlords often require that at least one-half of any excess Rent above the Master Lease Rent be paid to the Landlord. In the Landlord's Lease form the excess Rents (sometimes referred to as "transfer profits") are calculated based on the Base Rent figure, including any Tenant Improvement Allowance and brokers' commissions. The Sublandlord will attempt to negotiate the amortized amount of the Tenant improvements and brokers commissions out of the transfer profits provision.

(k) No Consent to Alterations. The Master Landlord's Consent should also state that the Landlord's consent to the Sublease is not a consent to any alterations to the Premises. Instead, Subtenant must seek Master Landlord's consent to any alterations as provided in that section of the Master Lease.

(l) Attorney and Administrative Fees. If the Lease so states, Landlord is entitled to its attorneys' fees and a set administrative cost in reviewing the Sublease. These fees are due and payable even if Landlord eventually withholds its consent to the Sublease. This clause should also state that the estimated amount of fees must be paid in advance of Landlord's review of the Sublease.

continued on page 8

Subleasing / continued from page 7

3. Termination/Recapture Rights.

Landlords should be familiar with the termination/recapture provisions of their Leases. Aggressive Leases will provide that upon the Subtenant's request for Sublease consent, the Master Landlord may terminate the Lease as to that portion of the Premises only, and recapture the space. This provision is often negotiated by Tenants, and the recapture provision is deleted from the Lease. However, upon presentation by a Sublandlord of a proposed Sublease, Landlords should carefully review the Lease for this provision. In today's real estate market, Landlords are unlikely to avail themselves of the benefits of this provision even if it is in a Tenant's Lease.

4. Percentage Rent Calculations (Retail).

Landlords in a retail setting should be certain that their Leases provide for an adjustment of the Percentage Rent rate in the event of a Sublease. A Sublease that results in a variation of the use of the Premises may well result in a decrease in revenue to the Landlord, if the change in use is to a category of merchandise where the volume of sales is lower but the percentage Rent rate would be higher if a direct Lease were negotiated. The Landlord should have a provision in its Lease and in its consent form where it is entitled to adjust upwards the Percentage Rent rate to account for the different use. Additionally, the Base Rent should be adjusted so that the Landlord's income remains constant even with the new Subtenant. This should be provided in the Master Lease. Another mechanism is to set a minimum Rent figure based on the average of the Base Rent plus the Percentage Rent, so that the Landlord is ensured of a minimum income even after a Sublease or assignment. This is particularly important in negotiating long-term Master Leases where regular increases in Rent are very limited and no operating covenant is included in the Lease. The objective of the Landlord is to share in the success of its Tenant or Subtenant, while at the same time insulating itself from a less profitable use of the premises or the cessation of Tenant's business in the premises.

5. Non-Disturbance.

When representing commercial Landlords, especially in smaller transactions, we recommend not making mention in any of the documentation regarding non-disturbance. Non-disturbance requires that the Landlord submit the Sublease in question to its lender, who likely retains counsel, and negotiates the non-disturbance language. If a Subtenant does not ask for it, we recommend that Landlords not offer non-disturbance. We have found that probably eighty to ninety percent of smaller transactions do not involve non-disturbance negotiations. In larger transactions, it is very common for a Subtenant's counsel to demand non-disturbance from the Landlord's lender, so that the Sublease is not automatically terminated on foreclosure by the lender.

6. No Breach of Exclusive Use Provisions.

If a Landlord agrees to a recognition agreement in the original retail Lease, a Landlord should strongly consider adding a provision that the Subtenant will not violate any exclusive use provisions and that the Subtenant will not affect the make-up of the project. The Landlord must ensure that the use and occupancy of the Premises by the Subtenant does not violate any exclusive use provisions granted to other occupants. Furthermore, the Landlord likely will not want to see the quality of the Tenant or the Tenant make-up change due to a Sublease. A Landlord may not want to recognize a Subtenant who is engaged in a discount operation although this may present other fair trade issues. This sort of restriction should be addressed in the consent provision of the Master Lease.

7. Recognition Right Personal to Tenant.

If Landlord agrees in its Master Lease to a recognition, it should agree to recognize only its original Tenant, and that Tenant's Subtenant. If the recognition right is made personal to the Tenant, the Subtenant cannot further assign or sublet and demand that the Landlord recognize the further subleaseor assignment.

Conclusion

Subleasing is an intricate process that requires a complete understanding of the rights and obligations of each of the three parties to the transaction. Issues of non-disturbance, recognition/attornment and consent, among others, are complicated and require thorough analysis of the documentation of the transaction and the rights, duties, and obligations of all three parties to the transaction. From the Master Landlord's perspective, the obvious concerns are control over the use of the Premises, creditworthiness of any occupant, its remedies against its original Tenant and any later occupants of the Premises, the mechanism to pursue defaults when it is not in privity of contract with the occupant, and compliance by the Subtenant with all of the obligations of the Master Lease, including exclusive use provisions, operating covenants, hazardous materials and compliance with laws, just to name a few. The Master Landlord can ensure these rights by crafting a thorough Master Lease, by carefully reviewing the Sublease to ensure it does not modify the rights of obligations of the Tenant and Subtenant *vis-a-vis* the Master Landlord, and by drafting a comprehensive Master Landlord's Consent which controls in the case of conflict with any other document to the transaction. BW

The Requirements of a Basic Brokerage Commission Contract

and Alternative Enforcement Mechanisms

BY SCOTT W. BARTON, ESQ. AND DAVID M. AUSTIN, ESQ.

I. Introduction.

With the recent slowdown in the economy, the once red-hot real estate market has followed suit. Although some predict a rebound in the relatively near future, the current lull presents real estate brokers with an opportunity to revisit the requirements of a valid brokerage commission contract, and reevaluate their business practices. All too frequently Berding & Weil is retained by brokers to advise them of their rights to a commission where no written agreement was executed, and all the broker has is a promise to pay from his/her principal. This article will examine the basic elements necessary to enforce a brokerage commission agreement. Additionally, we will highlight some available remedies for brokers where a formal written agreement was never executed.

II. The Formal Requirements of a Basic Brokerage Commission Contract.

1. Written Agreement Requirements.

Under California *Civil Code* 1624(c), an agreement that authorizes or employs a real estate broker related to the sale of real property or the lease of real property for longer than one year is invalid unless it is in writing. Simply stated, the general rule is that unless a brokerage agreement is in writing, it will not be able to be enforced (subject to very narrow exceptions discussed below). A licensed broker is presumed to know that contracts for real estate commissions are invalid and, therefore, unenforceable if not in writing Accordingly, a presumption will operate against the broker who seeks to plead ignorance that he or she did not know they needed to obtain a written brokerage agreement. As discussed below, that presumption may only be overcome in very limited circumstances.

2. Recommended Terms of a Broker Commission Contract.

In general, a valid and presumably binding brokerage contract should be entered into at the beginning of any brokerage relationship and contain the following terms: (i) the contract should identify the parties (i.e., the broker and the principal); (ii) the fact of employment; (iii) the property to be bought, sold or leased; (iv) the amount of commission; and (v) the conditions, if any, that must be satisfied before the broker is entitled to his or her commission. Additionally, the contract should be signed by both parties or, at a minimum, the contract should be signed by the person or entity retaining the broker. While all of the above terms should be recorded in a single document, several written communications may be the basis for proving the existence of a contract.

For instance, suppose Broker learns that Landowner is interested in selling a parcel for a very attractive price. Eager to get a commission, Broker contacts Buyer 1, an acquaintance whom Broker knows will be very interested. Buyer 1 is interested and hires Broker through a written employment contract whereby Buyer 1 will pay Broker a commission once the sale of the Landowner's parcel is completed. However, Landowner rejects Buyer 1's offer. Undaunted, Broker contacts Buyer 2, another acquaintance. Buyer 2 employs Broker by initialing only the commission provision of previous Broker-Buyer 1 agreement. Upon producing Buyer 2 to landowner, a deal is consummated and the parties sign a different sales agreement that states that Buyer 2 is to pay Broker a commission per a "separate" agreement. After the sale, however, Buyer 2 refuses to pay the commission, asserting that he was not bound to pay by any written contract. Is Broker entitled to a commission?

In *Friddle v. Epstien* (1993) 16 Cal.App.4th 1649, the court was presented with facts almost identical to those above. The court stated that among the essential requirements of the *Civil Code* are some written evidence of 1) subscription by the party to be charged (usually the one refusing to pay a commission) and 2) the fact of employment. The court then explained that a "subscription" was any evidence that a person intends to adopt an statement or undertake an obligation to another party. Furthermore, the court stated that the writing that the defendant "subscribes" to does not even need to contain all the essential terms of the contract. Rather, it is enough if there are a series of memorandum that contain the essential terms of the agreement and reasonably relate to each other, any one of which is signed by the party to be charged. Therefore, although Berding & Weil recommends getting all of the essential terms in a single document, a valid contract may be created through a series of writings.

i. The Identity of the Parties. The broker commission contract should identify the parties to the contract. The agreement should state the full name of the broker and the company, if applicable, that he or she works for. The agreement should likewise state the name of the owner of the property. If the owner is a corporation, several additional steps should be taken. First, a provision should be added to the agreement certifying that the persons executing the agreement are authorized to act on behalf of the entity. Second, in light of recent California case law, a broker should strongly consider requiring the signature of two persons authorized to act by the corporation (recent case law suggests that the signature of one authorized person may not be binding on the entity).

continued on page 14

The Business and Ethics of Negotiation

BY: PHILLIP H. STOERMER, ESQ.

STRATEGIES IN THE NEGOTIATION OF BUSINESS AND REAL estate transactions have been the subject of numerous books and articles over the years, many of them offering disingenuous means to succeed at all cost without regard to a longer range view of the resulting relationship and reputation issues. This article will touch on some of the techniques employed, address a few of the ethical issues and conclude with a personal perspective.

It is important to have an awareness of the potential approaches to negotiation that may be employed from the commencement to the end of the discussions. In opening the sessions, one can employ the "hard start" method, the "good guy" approach, or speed up or slow down the process of making the deal in order to achieve one's objectives of controlling the transaction. During the middle of the discussion, the negotiators may employ an antagonistic approach, utilize flattery, humility, silence, threats, or plead lack of authority in connection with specific issues. Usually, toward the end of the negotiation, the pace increases and there is a tendency to gloss over remaining issues which may be important but not critical to the successful conclusion of the deal. It is particularly important in such a context to control the documentation so that those issues can be addressed in the drafting process. Humanizing the relationship is helpful—it is never a good idea to walk away from a negotiation with the feeling that one would not want to shake hands with the opponent. The key is to be alert to the use of the techniques and have an effective counter to the method employed by your opponent.

In the context of ethical conduct, the utilization of "techniques" of negotiation is not inherently antithetical. Every profession has its code of ethics. Real estate professionals can look to the National Association of Realtors and to the local realty boards for direction. Lawyers are taught ethics as part of the law school process and required to pass examinations and, together with realtors, are required to take continuing education courses in the field to assure at least their awareness of these issues. Nothing can absolutely guarantee ethical conduct on the part of any person and, as Mark Twain once said "An ethical man is a Christian holding four aces," asserting his belief that it's easy to be honest when one has all the cards. However, it is not usually the situation that all of the cards are held on one side. So the question becomes how best to approach the negotiating table. Is it possible to propose a guideline that works in most, if not all, circumstances when negotiating a transaction?

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If we all had our choice, I am sure that we would prefer to (i) deal with clients who tell the whole story and do not hide important details and brokers who tell the story straight, communicate frequently and knowledgeably with the client or the attorney about the transaction and any changes, and (ii) avoid lawyers whose blustering and often rude behavior hides an inadequate knowledge or preparation or a desire to run up a bigger bill. Aside from issues of price and terms, because a change in circumstance can affect any transaction at any point, I regard communication, integrity and civility as major components of a successful negotiation.

If the objective truly is to make the deal work, then nothing short of a substantial change of circumstances should stop the accomplishment of that objective. A good start to the process is the full and honest disclosure that is necessary between the broker and its client and between the client and the attorney handling the transaction.

This is how I like to approach a transaction. It is absolutely necessary to know the facts, be familiar with all the documents and find out what you can about your opponent. Preparing your arguments in advance and the response to the opponent's arguments together with the development of a "fall back" position or a creative alternative is important. Knowing the strength of your bargaining position is critical, particularly in the context of the arguments and the issues that are vital to your client. Having an agenda in writing, whether in the form of a comment letter based on documents that are the subject of the discussions or simply a list of issues to be discussed, is necessary to a timely and organized approach in negotiations. The determination of who is to lead a negotiation should be made in advance and may depend on the nature of the negotiating technique to be employed as well as the subject for discussion. Business decisions remain in the realm of the business person and lawyers need to understand the client's comfort level on communications concerning those matters and on legal issues, knowing that all legal issues are really business issues that a client reserves the right to evaluate based on the level of acceptable risk. In the course of the negotiation, it is important to be dispassionate, to be prepared to solve problems and to read the non-verbal signals from your opponent. Use what works for you in terms of technique. But remember, "what goes around comes around." You may see your opponent again and employing a technique which is rude, abusive or demeaning, or in the worst case deceptive, can result in a failed transaction for reasons that

do not relate to the core of the transaction itself. One might consider a further truism—a deal that doesn't work for both sides is not a good deal. Grinding the transaction for the last dollar, or taking that very final inch of the hide off the deal because you can, may have unacceptable long-term consequences for all parties to the negotiation. While the transaction may in fact be completed, the post-closing relationship can become contentious if one party is overly aggressive in pursuing its objectives. It is better to make a fair deal and leave everyone with good feelings about the results than to set up the scenario where litigation will ensue because one of the parties feels disrespected and abused. BW

Fire Sprinklers / continued from page 1

releasing water into the area. Sprinklers are not complex devices and should operate automatically each and every time when needed. This statement was true until recently when widespread sprinkler problems began to appear. The first major problem arose with the use of an EPDM rubber O-ring seal. The seal expanded when exposed to water and given that the seal was designed to act as a dam, and was in constant contact with water, the expansion properties of the rubber affected performance. The rubber seals expanded, and when the sprinkler was activated, the seals stayed in place preventing the plunger from descending. Fire departments throughout the country observed sprinklers that failed to activate in a fire. Most sprinkler system designs rely upon overlapping sprinklers, so the damages tend not to be catastrophic, but far greater than would have occurred if the sprinklers had deployed. However, in a hospital, a series of sprinklers failed to deploy but numerous casualties were avoided through quick action by the staff. After almost two years of investigation the CPSC issued a recall of all EPDM O-ring sprinklers (known as Omega Sprinklers) manufactured by Central Sprinkler Company. More information about the recall and these sprinklers can be found at **www.omegarecall.com** (800) 896-5685. The Omega recall occurred in 1998. Last summer the CPSC issued another recall of sprinklers manufactured by Central Sprinkler Company. The problem with these sprinklers was two-fold. Again, there was an expansion of the O-ring seal. In this case the seal was made of a silicone mixture which tended to bond with the interior sides of the sprinkler, thus preventing the plunger from descending. In addition, the sprinklers would prematurely activate because the seal would deteriorate and under high water pressures, the plunger descended and water flowed. In this recall all of the sprinkler heads will be replaced and the replacement costs are borne by Central and its new parent company, Tyco Fire Products. For more information on this recall, go to **www.sprinklerreplacement.com**. Both sprinkler failures were also the subject of class or representative actions. This firm was involved in both failure cases, having been retained by Building Owners and Managers International (BOMA) and private building owners, to represent their interests in this issue.

There is information that the CPSC is investigating other sprinkler brands and models manufactured by companies other than Central; however those investigations are confidential and at this time the CPSC is not issuing any warnings about other brands. The recent experiences with sprinkler failures and recalls should change attitudes or elevate building owners' awareness of the fire sprinkler systems in their buildings. No longer can building owners assume that fire sprinklers will automatically work all the time and have lengthy service life. It was clear from the investigations by both the CPSC and this firm that time in service was a clear factor in sprinkler performance. We recommend that building owners do the following:

If you have Central Sprinklers and have not made a claim or investigated, do so immediately.

Check your sprinklers annually. Perform a visual inspection of each sprinkler. Any sign of corrosion is problematic and could indicate a serious problem. Also, any signs of water leakage should also raise alarms. Pull the head and either retain your own testing laboratory or send it to Underwriters Laboratory or Factory Mutual for testing.

Keep accurate records of your inspections and maintenance. Consult with your fire system contractor to ensure your system is performing at required levels. BW

Unlawful Detainer Law / continued from page 3

C. Calculating Timing on a 3-day Notice.

The 3-day period begins to run the day after the service of the notice. Therefore, at the end of business on the fourth day from the service date, the cure period has expired. If the end of the notice period expires on a weekend or holiday, the next regular business day applies. The time to respond is not extended due to mailing. Therefore, as long as the Landlord nails and mails on the same day, the day after is the beginning of the 3-day period. These same timing considerations are not true for the service of the unlawful detainer complaint.

D. Preparation and Filing of the Complaint/ Discovery.

If the Tenant does not cure during the cure period provided in the notice, the Lease is terminated as a matter of law so long as the 3-day notice so states.[9] The Landlord is under no obligation to accept Rent payments after the expiration of the cure period. If the Landlord does accept partial Rent payments during the cure period, the Landlord should strongly consider sending a non-waiver notice pursuant to *C.C.P.* 1161.1. The recent case of *Woodman Partners vs. Sofa U Love*, (2001) 94 CA4th 766, suggests that the non-waiver notice must be sent prior to cashing the check. A prudent Landlord will send the non-waiver notice by express mail and wait several days to process the Tenant's check. Otherwise, the acceptance of the partial payment could be seen as a waiver by Landlord of Tenant's default. Acceptance of full payment after the filing of the complaint will likely be seen by the Court as a waiver by Landlord of the default. If the time period to cure has passed, the Landlord should properly file its complaint for unlawful detainer. The unlawful detainer complaint should include the Tenant, Subtenants, and any other persons known to occupy the Premises. Consider serving a prejudgment claim to right of possession. The specific requirements of unlawful detainer vary significantly by local court rule, so it is imperative for the lawyer to consult the local rules before filing any action for unlawful detainer. The unlawful detainer complaint alleges the default of the Lease, attaches the Lease, the 3-day Notice and proofs of service, and any other pertinent documentation, and seeks a writ of possession on a summary basis. The summons accompanying the unlawful detainer complaint is a 5-day summons. Therefore, the Defendant (Tenant) must respond to the complaint within 5 days. If the Tenant does not respond, the Landlord may proceed with a request for default, accompanied by a default writ of possession.

Consider serving a prejudgment claim to right of possession.

If the time period to respond has expired, the Court will enter the default of the Tenant and order the writ of possession to issue. The writ of possession is delivered to the sheriff in the county for execution. The sheriff will give the Tenant 5 days' notice for it to remove its possessions by means of posting the writ of possession on the Premises, or be forcibly evicted. After expiration of the 5 days, the sheriff will forcibly remove the Tenant and its personal property from the Premises. It is necessary to consult with the executing sheriff for local policies and procedures.

If, however, the Tenant answers the complaint, the parties will generally conduct written discovery and depositions. This process generally is completed within 10 days of the Tenant's service of the answer or other responsive pleading. Plaintiff's counsel should be cognizant of the amount and timing of the discovery it conducts. Discovery should be carefully planned so that only the necessary elements of the eviction are explored. Any unnecessary discovery could result in a delay in the unlawful detainer trial. Depositions are to be conducted within 5 days of service of the deposition notice. Written discovery, including requests for admissions, form interrogatories, special interrogatories, and requests for production of documents are to be responded to within 5 days of service. Discovery cannot be served by Landlord's counsel until 5 days have elapsed from the service of the complaint. All discovery must be completed 5 days before the date originally set for trial. It may be appropriate to consider conducting discovery before requesting trial setting from the Court, or at least taking into account a discovery timeline before requesting a specific date from the Court.

E. Service of the Unlawful Detainer Complaint.

Personal service is always preferable. Personal service involves personally delivering a copy of the summons and complaint to the Tenant. The 5-day period to respond begins running at the moment of service. Substitute service involves leaving a copy with a person apparently in charge or authorized to accept such service, and then mailing copies to the office. Service is deemed completed 10 days after the mailing. "Nail and mail" can only be accomplished upon court approval based on a showing that the Defendant could not with reasonable diligence be served by any authorized manner other than publication. "Nail and mail" is effective 10 days after the nailing and mailing.

F. The Unlawful Detainer Trial.

The unlawful detainer trial is a relatively straight forward

[9] *C.C.P.* §1161.

process that can often times be completed in 2 or 3 hours. In a straightforward unlawful detainer, the Plaintiff can generally give opening remarks, introduce evidence and put on its prima facie case in 1 or 2 hours. More difficult and complicated cases often times are completed in 1 day. Plaintiff bears the burden of proving a *prima facie* case, and satisfying the elements of the action. Plaintiff must prove the following:

- *Landlord-Tenant Relationship*. Presumably by means of authenticating the Lease. This process should be done with requests for admissions during discovery.
- *Proper Service.* Proof that the 3-day notice was properly served is required and improper service is likely to be one of the Defendant's primary defenses. If the Defendant can invalidate any portion of the 3-day notice, its contents, or the service, the Plaintiff will be unlikely to prove its *prima facie* case, and a directed verdict will be entered for the Defendant. There is a statutory presumption of proper service if the service was accomplished by a registered process server. Therefore, it is always a good idea to have a registered process server serve the 3-day notice, and be available for trial testimony. Proper proofs of service for both the 3-day notice and the unlawful detainer complaint should be completed by the process server in order to avoid later attacks by the Defendant.
- *Non-Payment*. In non-payment of Rent cases, proof that Rent was not paid can be provided by the testimony of the Landlord or property manager, if appropriate.
- *Tenant's Withholding of Possession*. Plaintiff must show that the Defendant has failed to vacate the Premises. Generally, this is shown by testimony of the Landlord that the Tenant has not returned the keys, or has significant personal property still in the Premises. The Landlord may want to take photographs immediately preceding the trial, and authenticate those photos at trial to show the failure of Tenant to remove its personal property. This testimony may also properly be given by the property manager.
- *Value of the Rent*. Plaintiff must prove the value of the Rent. The Rent set forth in the Lease is highly probative of rental value. A Plaintiff may attempt to prove that the "rental value" damages are greater than the contract amount (presumably in a quickly escalating commercial market). Plaintiffs are advised to retain an expert to prove "rental value" damages if they seek greater damages than the contract amount. Self-serving testimony by the Plaintiff is of little persuasion to the Court, and may be disallowed.
- *Malice.* If Plaintiff can prove malice in Tenant's conduct of retaining possession of the Premises, the Plaintiff may be entitled to statutory damages of up to $600.00. Many attorneys do not include a prayer for relief for the $600.00 statutory damage because of the burdens of proving malice. The standard is very subjective, and can confuse the relatively straightforward nature of an unlawful detainer action. The standard for Malice in unlawful detainer cases is whether the Tenant acted in a "willful, deliberate, intentional and obstinate" manner in its withholding of possession.

Tenant Defenses (very limited):

- Timely tender of estimated payment defense (*C.C.P.* 1161.1)
- Improper 3-day notice (either contents or service)
- Landlord lacks title
- Landlord committed fraud
- Landlord breached contract of quiet enjoyment
- Waiver/estoppel
- Landlord breached implied warranty of habitability
- Retaliatory Eviction
- Discriminatory Eviction
- Landlord breached implied covenant of good faith and fair dealing
- Landlord breached Lease provision prohibiting unreasonable withholding of consent to transfer
- Improper service of complaint

G. Damages Awardable in Unlawful Detainer (Delinquent Rent only).

Generally, the damages available to a Plaintiff in an unlawful detainer case (besides an award of possession of the Premises) are limited to delinquent Rent (no future Rent), and the necessary costs incurred and incidental damages to the unlawful detainer. Unlawful detainer damages are limited to the following: (i) delinquent Rent, including other sums due if the Lease form is properly drafted, limited to one year in duration; (ii) attorneys' fees (if the Lease provides for them – generally the Lease will include prevailing party provisions); (iii) costs of suit (if the Lease provides for them); (iv) interest and late fees pursuant to the Lease (or interest by law); and (v) statutory damages (if malice is proven).

H. Rental Damages for Term of the Lease.

In addition to delinquent Rent, Landlords often wish, and may be entitled, to sue for Rent for the remaining Term of the Lease. The rights of Landlords to sue for future Rent of the term of the Lease are provided for in the Lease document and California *Civil Code* Section 1951.2 and 1951.4. We will address the issue of future rents in the next issue of the *ALERT*.

continued on page 15

Commission Contract / continued from page 9

ii. State the Fact of Employment. In any broker commission contract, the fact that the principal intends to employ the broker must be obvious on the face of the agreement. However, in the event that the "writing" is silent regarding the fact of employment, a court may infer the fact of employment if it states that the broker is to be compensated through a commission.

iii The Property to be Bought, Sold or Leased. In order to form a valid broker commission contract, the agreement must at least identify the property to be bought, sold or leased. This requirement does not mandate use of the property's legal description. Rather, the contract need only identify the property with enough clarity that other evidence can establish its identity with certainty. For example, a contract simply identified the property as "all lots known as Plymouth Village (Corner of Alpine and Plymouth Road), County of San Joaquin, State of California." The court found that the identification was sufficiently clear because testimony by either the owner or the broker could establish the precise identity of the property with certainty. Courts are willing to allow a certain amount of ambiguity as long as any uncertainty can be cleared up by testimony from the broker, seller, buyer, or by other evidence.

iv. The Amount of the Commission. The broker commission contract should describe the amount of the commission, whether it be a fixed sum, or a traditional percentage of sales price, or lease revenue stream. However, the amount of the commission may not be an essential element. From the fact of employment, courts may infer that the broker is entitled to a commission. Therefore, all that needs be proven is the existence of an employment relationship, and neither the amount of the commission nor a specific promise to pay needs to be included to form a binding brokerage agreement. That is, if the "writing" indicates that the principal is retaining the broker but does not mention commission, later testimony in court can establish the amount of the commission. Extrinsic evidence may be admissible at trial to supplement the terms of the agreement, in order to establish the amount of the commission. Courts may also select the amount of the commission based on industry standards.

v. The Conditions That Must be Satisfied. Generally, the most important condition to be included in a broker commission contract is that the commission is earned at the time of the sale or lease. Disputes often arise when a broker procures a purchaser who is ready and willing to perform, but the transaction is not completed due to minor negotiating points. The broker believes he is entitled to a commission because he has procured a willing purchaser. The owner believes no right to a commission has accrued because the property was not sold or leased. This distinction should be dealt with in the brokerage agreement. Similarly, in some cases the broker starts out to find a buyer of a parcel and ends up finding a tenant, or acting on behalf of a tenant ends up with a purchase and sometime during the negotiation the principals decide to change a sale into a lease or vice versa. Accordingly, a prudent broker should insist that the contract clearly state the commission is earned so long as the transaction is completed, regardless of whether it ends in a sale or a lease.

III. Examples of Imperfect Contracts Enforced by the Courts.

As stated above, Berding & Weil strongly recommends that brokers follow the above guidelines when entering into broker commission contracts. Nevertheless, brokers may not always do so. Accordingly, the courts have enforced a variety of broker commission contracts even though the recommended elements were incomplete.

- *Performance After Expiration of the Contract.* Frequently, a broker will continue to market a property after the written brokerage contract has expired. Often times the parties to the contract are unaware that the term of the contract has expired. In other instances, the broker decides to continue pursing his or her representation in the belief that the contract may still be valid, or that his client will "do the right thing." If the contract has expired, and the principal consents to the performance, then the broker can recover his or her commission under the contract if the principal completes the transaction.
- *Equitable Estoppel.* In a very few cases, the broker may be able to recover his commission where, based on an oral promise to pay the commission, the broker changes his position to his detriment. For example, in some cases, the broker had a valid and enforceable contract with the seller and the buyer promised to pay the commission if the seller lowered his asking price. After the seller reduced the price and the broker rescinded his contract with the seller based on the buyer's promise, the court refused to allow the buyer to invoke the writing requirement in order to avoid paying the commission. However, in those cases, some critical facts were that the broker had a valid written contract with the seller that he gave up to his detriment and the buyer had benefitted from the lower sale price.
- *Tort Theories.* Under closely related circumstances to those immediately above, a broker may be able recover compensation under tort theories. For example, where the buyer promises to pay the commission if the seller drops her asking price and there is only an oral commission agreement between the seller and the broker, the broker may be able to recover under the tort of intentional interference with prospective economic advantage.
- *Fraud.* A broker can recover under an oral agreement if the principal engages in actual fraud. In most cases, a broker cannot reasonably rely on an oral promise to either pay a commission or later execute a contract. However, in some cases, a broker may be able to rely on a principal's representations that a contract has, in fact, been signed. In one case, for example, the

principal's attorney assured the broker that the principal had signed the contract when, in fact, the principal had not. The court found that on such facts, the broker could recover his commission if the broker could prove that he reasonably relied on the statements of the principal's attorney.

- If the parties write the essential terms of the purchase agreement on the back of a business card and initial the card, then the broker probably has enough evidence of employment to recover his commission.
- Courts may enforce a brokerage contract which evidences only the fact of the hiring and does not evidence most of the other terms (i.e., the price, the commission, the term, etc.).
- A memorandum signed by an owner and delivered to a broker which states the description and price of the land, and asks the broker to "get an offer" was a sufficient hiring of the broker for the court to enforce the commission contract.

IV. Compensation for Non-Brokerage Services.

As noted above, all contracts should be in writing, regardless of whether they relate to brokerage services or not. While the law mandates that all real estate brokerage contracts be in writing to be enforceable, it allows greater flexibility for contracts that do not fall under *Civil Code* § 1624. For example, an oral contract may be enforceable if it is not for brokerage services involving the sale or lease of real property and is capable of being performed within one year. Similarly, under the doctrine of restitution, a broker may be able to recover under an oral agreement for services rendered to the principal unrelated to the purchase, sale, or leasing of real property. For example, a broker's services in getting plans, specifications and estimates, arranging surveys, and negotiating the construction of a building may be the subject of a valid oral contract. Likewise, a broker may be able to recover for time and money spent on the principal's behalf in subdividing the property. However, because the facts of every case vary, we strongly advise that all brokers consult competent legal advisors about individual cases.

V. Conclusion.

Real estate brokers should obtain written agreements for their services which contain the five requirements discussed above. In the event the broker fails to obtain such a contract, he or she unwisely places his or her commission at risk and may incur substantial legal costs attempting to recover for services rendered. Brokers who believe a commission is owed, but do not have a written contract, are urged to consult an attorney immediately to evaluate what rights they may have to pursue their principal for payment. BW

Unlawful Detainer Law / continued from page 13

5.Accepting Rent Payments After Service of the 3-day Notice or Unlawful Detainer Complaint.

Generally, the acceptance of partial payments of delinquent Rent, after the giving of a default notice or filing of an unlawful detainer complaint, may be seen by the Court as a waiver of the Landlord's rights to enforce payment of the full delinquent amount, and may waive Landlord's claim to a right of possession based on that default. After service of a 3-day notice, the Landlord must accept the cure until the cure period has expired. After the filing of an unlawful detainer complaint (and likely after the service of a 3-day notice), a commercial Landlord must give actual contemporaneous notice to the Tenant that the acceptance of a partial payment does not constitute waiver of any right the Landlord may have to recover the remaining amounts owed or recover possession of the Premises. [*Code of Civil Procedure Section* 1161.1(c)]. Language in the Lease to the effect that the acceptance of Rent by Landlord will not be a waiver of any preceding breach by Tenant of any provision hereof, other than the failure of Tenant to pay the particular Rent so accepted was found to satisfy the "actual notice" requirements of *Code of Civil Procedure Section* 1161.1(c). While the Woodman case cited above indicates that the notice required in *C.C.P.* 1161.1(c) is not required if proper language is contained in the Lease, prudent Landlords should continue to give an actual notice of non-waiver to the Tenant prior to the acceptance of partial payments of Rent. The *Woodman* case also made clear that the non-waiver notice should be given prior to the acceptance of the partial payment. We recommend holding the check, giving notice by overnight mail or other expedited process, and negotiating the check approximately 3 days after the Tenant receives the notice.

Acceptance of the full amount of Rent due before the 3-day notice has expired operates as a cure of the default, entitling the Tenant to continued possession of the Premises. Acceptance of full payment after the filing of the complaint will likely be seen by the Court as a waiver of the default by Landlord. Landlords, who desire to regain possession after the filing of the unlawful detainer, should strongly consider rejecting the Rent payment. The Landlord is entitled to continue pursuing the unlawful detainer and possession of the premises.

6.Conclusion.

Unlawful detainer is a hypertechnical process that requires attention to detail and a thorough understanding of the California statutory framework. However, if properly prosecuted, an unlawful detainer is a remedy wherein a Landlord can regain possession of the premises on an expedited basis. For questions, concerns or suggestions, please feel free to contact us. BW

Berding & Weil Profiler

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PHIL STOERMER IS A THIRTY+ YEAR veteran of the commercial real estate business. After graduating from USC where he met his wife, Daphne, with whom he recently celebrated their 40th wedding anniversary, Phil worked as a credit manager and sales representative for an apparel company in Southern California while attending law school at Southwestern University in Los Angeles. After stints as counsel for Coldwell Banker and Santa Anita Consolidated, Phil accepted the position of V.P. and General Counsel for Grubb & Ellis and moved his family north in 1972. Since 1976, he has been in private law practice, working on behalf of a wide range of real estate and business clients, including developers and owners of office, industrial and shopping center projects, tenants for all types of property, commercial real estate brokers and managers, and in businesses as diverse as a taxicab company, an apparel manufacturer and a fast food franchise. Phil's vast experience includes commercial leasing, purchase and sale of real property, and all aspects of the acquisition, disposition, leasing, finance and operation of all forms of commercial real estate. Phil joined Berding &Weil in September 2001 after several years as a principal at Miller Starr & Regalia and previously with Tobin & Tobin. Phil has taught real property in law school and has spoken to groups such as IREM, BOMA, the Northwest Center for Continuing Education and Commercial Real Estate Women (CREW) on a variety of business and real estate issues. On the topic of commercial leases, Phil has lectured frequently for the Continuing Education of the Bar and has addressed the legal aspects of the shopping center business for the International Council of Shopping Centers at their local and national meetings and law conferences. Phil resides in Danville and, in addition to memberships in various bar associations and in ICSC (since 1970), is a member of E Clampus Vitus and the Family Club, and is an avid landscape photographer. BW

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UPCOMING EVENTS

For past issues of *Commercial ALERT* please visit: www.berding-weil.com

Friday, August 30, 2002
12:00 - 1:00
Alamo Office

LUNCH SEMINAR!

Unlawful Detainer Seminar
Berding & Weil Conference Room- Alamo Office

By Scott W. Singer, Esq.

R.S.V.P to Roxanne Mizzo by August 27, 2002.
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LUNCH PROVIDED

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Design:
Charette Communication Design

Photography:
Eyewire, Getty, Indexstock

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