

## **Liquidated Damages under The Florida Residential Landlord and Tenant Act.**

### **Background**

It is well settled law in Florida that the parties to a contract may stipulate in advance to an amount to be paid or retained as liquidated damages in the event of a breach.<sup>1</sup> However, as many residential landlords have learned, such freewheeling ability to contract<sup>2</sup> was not so free before the recent amendments to The Florida Residential Landlord and Tenant Act (“Act”).

Prior to 2003, the only statutory provision of the Act which allowed a landlord to assess liquidated damages against a tenant was found in Fla. Stat. §83.682. That section was specifically limited to tenants who were members of the United States Armed Forces and were required to move more than 35 miles away from their dwelling, pursuant to permanent change of station orders. The liquidated damages were limited to one month’s rent and further depended upon the months of tenancy the service member tenant fulfilled during the lease term.

### **Florida Statute §83.575**

Now there are two such sections which authorize a landlord to charge liquidated damages. The first liquidated damages provision is provided by Fla. Stat. §83.575, which applies to tenancies which end, but where the tenant fails provide notice prior to the end of the lease term. In 2003, the legislature amended §83.682 by removing the liquidated damages portion of that section and creating an entirely new section, §83.575, which made liquidated damages an available remedy for landlords of all tenants. But the liquidated damages were limited to end of term breaches by the tenants who failed to give timely notice of their intent to vacate. Section 83.575(2) thus provided that any tenant, not just those tenants who were also members of the United States Armed Forces, may be required to provide the landlord up to 60 days’ notice before vacating the premises or be liable for liquidated damages. Still, the statute was silent as to any limitation on the amount of the liquidated damages.

Then in 2004, partially in response to a scathing editorial in the Sun Sentinel, critical of the unbalanced bargaining power the landlord was granted in the landlord-tenant relationship, the legislature amended §83.575 to impose strict procedural requirements.<sup>3</sup> Now the landlord must strictly comply with notice requirements before he or she may assess liquidated damages against a tenant who failed to timely notify the landlord that the tenant intended to vacate at the end of the lease term. The statute requires the landlord provide notice to the tenant of the liquidated damages penalty, within 15 days before the notice period begins. And the landlord must list all fees, penalties and applicable charges in the notice, otherwise the landlord’s claim for liquidated damages may be invalidated by the courts.

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<sup>1</sup> *Lefemine v. Baron*, 573 So. 2d 326, 328 (Fla. 1991).

<sup>2</sup> *Olen Properties v. Moss*, 984 So.2d 588, 560 (Fla. 4th DCA 2008).

<sup>3</sup> Fla. S. Reg. Indus. Comm., CS for SB 2666 (2004) Staff Analysis (final April 13, 2014).

## Florida Statute §83.595(4)

The second and more common liquidated damages provision is that provided by Fla. Stat. §83.595(4) (2008), which permits landlords to impose an early termination fee or liquidated damages on tenants who terminate their lease before the expiration of the lease term, i.e. early termination. The genesis of §83.595(4) can be traced back to two South Florida cases which were decided more than a decade ago.<sup>4</sup> Those two cases, *Yates v. Equity Residential Properties Trust*<sup>5</sup> and *Olen Residential Realty Corp. v. Romine*,<sup>6</sup> challenged the parties' ability to freely contract and sent shockwaves throughout the residential rental industry that persisted for four more years before the legislature could effectuate change.

*Yates* was a class action lawsuit representing approximately 4,473 class members. The court found that the landlord's practice of charging tenants an early termination fee, in addition to rent until the apartment was re-rented or until the expiration of the lease, was a violation of The Florida Residential and Landlord and Tenant Act. Specifically, the court found that the early termination fee violated Fla. Stat. §83.47(1)(a), which states: "A provision in a rental agreement is void and unenforceable to the extent that it purports to waive or preclude the rights, remedies, or requirements set forth in this part." The court explained that Fla. Stat. §83.595(1) (2004) set forth the only remedies available to a landlord for a tenant's breach or early termination of the lease agreement. Those remedies were limited to: 1) treating the lease as terminated and retaking possession for the landlord's own account; 2) retaking possession for the account of the tenant and holding the tenant liable for rent due for the remainder of the lease term or until the unit is re-rented; or 3) standing by and doing nothing, holding the tenant liable for rent as due. By charging early termination fees, in addition to actual damages of lost rent, the landlord was receiving rent in excess of the permissible charges allowed under the Act.<sup>7</sup>

The *Olen* case, by contrast, was not a class action lawsuit, but involved a business practice similar to that implemented by the landlord in *Yates*, which included charging liquidated damages in addition to rent due through the term of the lease for early termination by the tenant. The *Olen* court, however, viewed the liquidated damages clause as an unenforceable penalty rather than liquidated damages. In reaching this result, the court in part applied the "*Lefemine test*"<sup>8</sup> to the landlord's liquidated damages clause. That test basically states that when the non-breaching party (landlord) is able to choose between two options for damages, one being an agreed upon penalty fee as "liquidated damages" and the other being rent through the end of the lease term as "actual damages," that party will always choose whichever option yields the greater

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<sup>4</sup> Fla. H.R. Comm. On Const. and Civ. L., HB 1489 (2008) Staff Analysis (final April 9, 2008).

<sup>5</sup> *Yates v. Equity Residential Properties Trust* (Fla. 15<sup>th</sup> Cir. Ct. Dec. 1, 2004).

<sup>6</sup> *Olen Residential Realty Corp. v. Romine*, 2004 WL 3322327 (Fla. 15<sup>th</sup> Cir. Ct. May 27, 2014).

<sup>7</sup> *Yates* (Fla. 15<sup>th</sup> Cir. Ct. Dec. 1, 2004).

<sup>8</sup> *Lefemine*, 573 So. 2d at 329-30.

amount of damages. Thus, the option to choose negated the intent of the parties to select liquidated damages.<sup>9</sup>

These two cases made it obvious to the legislature that landlords and tenants wanted to be able to exercise their freewheeling ability to contract, but their right to do so was stymied by the statutory restrictions imposed by Fla. Stat. §83.595(1) (2004). In 2007, the legislature responded with its solution to the problems faced by the landlords in *Yates* and *Olen*. It passed HB 1277, which included a comprehensive amendment to Fla. Stat. §83.595 by adding an additional remedy to the total universe of choices available to a landlord when a tenant had not completed the term of the lease.<sup>10</sup> The amended statute included a new subsection (4) that allowed landlords to charge up to two months' rent as liquidated damages. However, despite HB 1277 passing by a vote of 101 to 14 in the House and unanimously in the Senate, it was vetoed by Governor Crist who believed that the impact of such liquidated damages would be too great for those Floridians least able to afford it.<sup>11</sup>

The following year, the legislature responded to Governor Crist's veto with a new and improved version of HB 1277, which now empowered the tenant to select which measurement of damages would apply for breach of early termination. In 2008, HB 1489 passed both houses unanimously and was approved by the governor on June 10, 2010.

#### **Practical Analysis of §83.575(2) and §83.595(4)**

While the passage of both §83.575(2) and §83.595(4) codified a landlord's ability to charge liquidated damages without fear of running afoul of the Act, these statutes must be strictly complied with, substantial compliance is not enough. Any party seeking to receive the benefits of a statute in derogation of the common law must demonstrate strict compliance with the statute's provisions.<sup>12</sup> That means a landlord must strictly comply with all the procedural and substantive requirements of the statutes; a landlord must cross all the "t's" and dot all the lower case "j's."

In order to charge liquidated damages under §83.575(2) for a tenant's failure to provide advance notice of his or her intent to vacate at the end of the lease term, the landlord must provide written notice to the tenant 15 days before the notification period begins, specifying the tenant's obligations under the notification provision contained in the lease and the date the rental agreement is terminated and further listing all fees, penalties and applicable charges in the notice.

Let's assume that a lease terminates on December 31 and provides the maximum allowable 60 days' notice period. The notice period would therefore begin on November 1 (60 days before December 31). And the landlord would be required to send notice to the tenant

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<sup>9</sup> *Id.*

<sup>10</sup> *Olen Properties v. Moss*, 984 So.2d at 560.

<sup>11</sup> Veto of Fla. CS for HB 1277, 1 Eng. (2007) (letter from Gov. Crist to Sec'y of State Browning, May 24, 2007).

<sup>12</sup> *Ady v. Am. Honda Fin. Corp.*, 675 So. 2d 577, 581 (Fla. 1996).

sometime between October 17 and October 31, which is within 15 days of the notification period. If the landlord sent the reminder notice before October 17, or after October 31, the landlord would have failed to strictly comply with the statute and would likely be denied his claim for liquidated damages. Similarly, if the landlord failed to send a reminder notice at all, or if the landlord required a 70 day notice period, his assessment of liquidated damages would likely be denied. Additionally, if the reminder notice failed to mention all fees, penalties and applicable charges, the landlord would likely be denied his claim for liquidated damages.

The same strict compliance applies to charging liquidated damages under §83.595(4). In order to charge liquidated damages for a tenant's breach or early termination, the tenant must be provided with the choice of selecting among liquidated damages or actual damages, at the time the lease agreement is entered into. Additionally, the amount of liquidated damages must be limited to two months' rent, regardless of when during the lease term the breach occurs. And, the landlord cannot require the tenant provide more than 60 days' notice prior to the tenant's proposed date of early termination if the lease contains an early termination option therein. Moreover, §83.595(4)(b) makes the liquidated damages penalty for breach by early termination inapplicable if the breach is for a tenant's failure to provide timely notice as required in §83.575(2).

Let's assume that a lease terminates on December 31. Some 8 months into the lease term, the tenant breaches the lease agreement by vacating early and surrenders possession on August 31. If, at the time the lease was entered into the tenant selected the liquidated damages option, then the landlord could assess up to a two month penalty fee. The landlord would not be able to charge rent for the months of November or December, and would be limited to only two months' rent as damages. However, if the tenant vacated and surrendered possession on September 10, then the landlord could charge rent through the end of September, plus the two month liquidated damages fee. But under no circumstances can a landlord assess a 60 day "insufficient notice fee," plus the two month liquidated damages fees as such assessment would violate the limitations specified in §83.595(4).

Let's assume that a 12 month lease terminates on June 10, and the tenant breaches the lease agreement by vacating and surrendering possession on May 31, and fails to pay the prorated portion of rent due for June. If, at the time the lease was entered into the tenant selected the liquidated damages option, then the landlord could potentially have an argument to assess up to a two month liquidated damages fee, because the statute allows for it. However, the landlord could still face a challenge for imposing a two month penalty for this 10 day breach.

The court will apply a test as to when a liquidated damages provision will be upheld and not stricken as a penalty clause. First, the damages consequent upon a breach must not be readily ascertainable. Second, the sum stipulated to be forfeited must not be so grossly disproportionate to any damages that might reasonably be expected to follow from a breach as to show that the parties could have intended only to induce full performance, rather than to

liquidate their damage.<sup>13</sup> In applying this test, the court could find that imposing what amounts to a two month penalty is grossly disproportionate to the actual damage sustained by the landlord. In which case, a landlord could have avoided such a challenge by foregoing the liquidated damages penalty and only assessing the prorated rent as it would have come due through the lease expiration date.

### **Conclusion**

In sum, the creation and subsequent amendments to Fla. Stat. §83.575 and §83.595(4) have codified liquidated damages and expanded the remedies available to a landlord for a tenant's breach. And in the instance of early termination, it empowers the tenant to select his or own exposure to damages, whether actual or liquidated, and provides a fixed amount that a tenant can more easily manage. But the unwary landlord could be left with an unenforceable penalty fee if the landlord does not strictly comply with the statutory requirements.

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<sup>13</sup> *Lefemine*, 573 So. 2d at 328 (citing *Hyman v. Cohen*, 73 So.2d 393 (Fla.1954)).