

# Terminating a Commercial Tenancy

## Where Form *and* Substance Count

We often hear practitioners invoke the old adage about "form over substance," but commercial unlawful detainers are one area where both form *and* substance count. If the form is wrong, the substance usually doesn't matter. It is surprising how often large commercial landlord clients, who are usually owed tens of thousands in back rent and charges, try to commence the unlawful detainer process themselves to save a few dollars in attorney's fees. More often than not, they find themselves mired in delays because they made technical mistakes with the notices served on the tenants. Or, they have a hard time believing an attorney when they're advised to serve new notices, confident that the court will overlook arcane technicalities. Such confidence is typically misplaced. With commercial unlawful detainers, a practitioner must ensure that (1) the proper type of notice or notices are served and (2) the correct amount of rent and charges are listed in detail on the notice. Although each of these issues sounds simple, it is amazing how often "do it yourself" clients and inexperienced practitioners get it wrong.

There are five primary types of notices that are served on commercial tenants to terminate their tenancy.

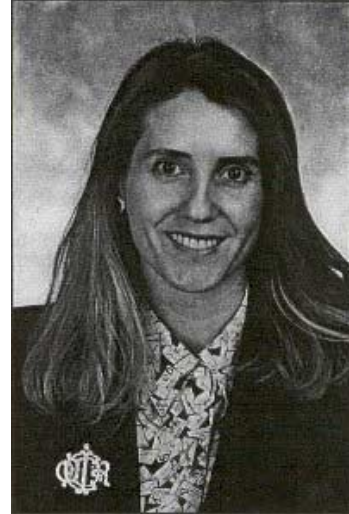
The first is a Three Day Notice to Pay Rent or Quit pursuant to Code of Civil Procedure § 1161(2),

which may be used only to demand the payment of rent accrued rent for January, March, April, etc., but will skip February. Rather than applying the March check toward February rent and the April check toward March rent, the landlord allows the tenant to dictate what has and has not been paid. When a year or more later the tenant is behind by six months, the landlord wants to collect the six months that is now past due and the rent from the prior February.

Landlords are usually convinced that their attorneys must be mistaken when informed that they will have to file a separate breach of contract action to recover back rent that is more than 12 months past due. Encourage your commercial landlord clients to pay the oldest invoice first with the money received from the tenant and to put a clause in their lease agreements stating that this is how all monies received will be applied.

Caution your clients that the amount of overdue rent stated on a Three Day Notice to Pay Rent or Quit must be calculated precisely, should reference the corresponding month(s) for which the rent is owed and cannot demand rent until after the stated amount becomes due. An overstatement will render the notice invalid (although an understatement will not). The client should double

*By Ann Marie DeDie*



check its general ledger and ensure that the amount of rent received and owed has been properly recorded. Even if tens of thousands in back rent is owed, an error of a few dollars will result in a judgment in the tenant's favor.

A Three Day Notice to Pay Rent or Quit should not be used to demand the payment of real property taxes, common area maintenance charges or late fees unless these have been defined as "additional rent" by the lease agreement. Although many leases define late fees as "additional rent," very few define the real property taxes, common area maintenance fees, bounced check charges, management fees or other charges as "additional rent." Requesting both rent and other charges on a Three Day Notice to Pay Rent or Quit is a common mistake landlords make.

## *Terminating a Commercial Tenancy (Continued)*

Although some cases have upheld a landlord's right to request non-rent charges in a Three Day Notice to Pay Rent or Quit pursuant to Code of Civil Procedure § 1161(2) (see *Bevi// v. Soura* (1994) 27 CA4th 694, 697-698, FN1), others have not (*Cal-American Income Properties* (1984) 161 CA3d 583, 585-586). It is much safer to demand non-rent charges in a Three Day Notice to Perform Covenant or Quit pursuant to Code of Civil Procedure § 1161 (3), discussed later in this article.

If the lease calls for the payment of rent based on sales (i.e. percentage rent) or a flat rate in addition to percentage rent, the landlord may serve the second type of notice -Three Day Notice to Pay Estimated Rent or Quit. The notice must specifically state that it is being served pursuant to Code of Civil Procedure §1161.1 and that the rent amount is estimated." "So long as the landlord's estimate is reasonable, an overstatement will not render the entire notice invalid. There is a presumption affecting the burden of proof that so long as the under-statement or overstatement was within 20% of what was actually owed, it is reasonable. Code of Civil Procedure §1161.1(e). The landlord will also have to plead in the complaint and produce evidence at trial of the reasonableness of the estimate.

The tenant may only prevail if he or she has paid a lesser amount within the three days and that lesser amount is found by the court to be the correct amount of rent that was in fact owed. In that event, however, the tenant will be the prevailing party and will most likely be entitled to attorney's fees under the lease agreement. Another disadvantage is that following a judgment in the landlord's favor at trial, the tenant who has paid or attempted to pay a lesser amount of rent reasonably estimated to be due may within five days pay the difference between what he or she estimated and the court found to be due (plus costs and fees if applicable) and retain possession of the property. This rule does not apply to a traditional Three Day Notice to Pay Rent or Quit that is not based on estimated rent due.

Both of the above notices must be stated in the alternative, to pay or quit. If the tenant pays within the three days, the landlord has no discretion to refuse the rent and the tenancy will continue. Unlike residential tenancies, however, commercial landlords are specifically permitted by Code of Civil Procedure § 1161.1(b) and (c) to accept partial rent payments after the

expiration of the three day notice without risk of waiving any rights or defenses, including the right to recover possession of the property, so long as the landlord gives actual notice to the tenant of the foregoing. The third type of notice to terminate a tenancy is a Three Day Notice to Perform Covenant or Quit pursuant to Code of Civil Procedure § 1161(3)," "which may be used for innumerable breaches, including the tenant's failure to pay real property taxes, common area maintenance charges and other charges and fees. Interestingly, the "12 month" rule does not apply to non-rent charges. Thus, the landlord may use a Three Day Notice to Perform Covenant or Quit to demand property taxes or common area maintenance charges that are more than 12 months old.

Usually, with a tenant who is behind in rent, two notices are required -a Three Day Notice to Pay Rent or Quit and a Three Day Notice to Perform Covenant or Quit. The first notice demands the past due rent while the second demands the past due non-rent charges. The two notices should be served together and the landlord should make it clear that each needs to be cured. An added benefit of the two notices is that it insulates the landlord from accounting errors.

## *Terminating a Commercial Tenancy (Continued)*

Even if one of the notices is found to be defective because the landlord has overstated the amount due, the second notice (assuming it is correct) will suffice to support a judgment of unlawful detainer.

The fourth notice used to terminate a tenancy is Third Day Notice to Quit, which may be used with month-to-month tenancies where the landlord wants the tenant out regardless of the reason. Civil Code § 1946 and Code of Civil Procedure § 1161(1). No reason needs to be given or should be given. Not giving a reason allows the landlord to change his or her mind about the reason given without risking a claim of retaliation. If, for example, the landlord tells the tenant that he or she is thinking of remodeling the premises and using it for a different type of tenancy but then changes his or her mind after evicting the tenant and getting bids, the landlord is left open to a charge of retaliation or pretext. The tenant may allege that the originally stated reason was never true and that the landlord's plan all along was to evict the tenant

because of his or her race, ethnicity, etc." Thus, it is always safer to give no reason despite the tenant's questions.

The final mistake made by practitioners with too much work and too little time is failing to read the lease agreement in detail. Unlike residential tenancies, many tenant rights can be waived in a commercial lease. See *Hignell v. Gebala* (1949) 90 Cal.App.2d 61, 68-69 in which the lease called for a 15-day notice via registered mail to terminate a lease. The termination was upheld by the appellate court, which noted that the parties were free to agree to termination upon notice different from and superseding prescribed statutory notice. Similarly, experienced tenants may demand more than three days' notice for a breach of the lease. The lease agreement may or may not define late charges, real property taxes, etc. as "additional rent." The lease agreement may have been made with a prior tenant and assumed by the current tenant. Therefore, it is imperative that a practitioner carefully review the lease prior to drafting any notices.

With a little time and effort, a commercial unlawful detainer action will be smooth and give the practitioner an "easy" win. Even a small error, however, can quickly complicate matters and give the practitioner an embarrassing loss.

*-Ann Marie De Die is a partner with Shapiro, Buchman, Provine & Patton, LLP, and specializes in real estate and business litigation and family law."*

"1. At least one case cautions against the approach of trying to re-define rent. "Merely calling an item 'rent' does not make it so: cf. Shakespeare, *Romeo and Juliet*, II, 2, lines 43-44 {roses}." *Dills v. Redwoods* (1994) 28 CA4th 888, 890, internal citations and quotation marks omitted."