Eviction Procedures:
Self-Help and Termination Notice

Prepared by:
Gary S. Rubenstein
Schulman, LeRoy & Bennett, P.C.

LORMAN®
Published on www.Lorman.com - November 2019

INTRODUCING

Lorman's New Approach to Continuing Education

ALL-ACCESS PASS

The All-Access Pass grants you UNLIMITED access to Lorman's ever-growing library of training resources:

- ☑ **Unlimited Live Webinars** - 120 live webinars added every month
- ☑ **Unlimited OnDemand and MP3 Downloads** - Over 1,500 courses available
- ☑ **Videos -** More than 1300 available
- ☑ **Slide Decks -** More than 2300 available
- ☑ White Papers
- ☑ Reports
- ☑ Articles
- ☑ ... and much more!

Join the thousands of other pass-holders that have already trusted us for their professional development by choosing the All-Access Pass.

Get Your All-Access Pass Today!

SAVE 20%

Learn more: www.lorman.com/pass/?s=special20

Use Discount Code Q7014393 and Priority Code 18536 to receive the 20% AAP discount.

*Discount cannot be combined with any other discounts.

EVICTIONS & UNLAWFUL DETAINER

Self-Help and Termination Notice

Some landlords (at least those who have not yet been sued) still believe that it is legal to "lock out" a commercial tenant who has not unequivocally abandoned the premises. A great many form leases give this right to the landlord (i.e:, "with or without force"). While at early common law a landlord had the right to recover property by force, Tennessee law clearly and unambiguously holds that "no person shall enter upon any land [unless] entry is given by law, and only then in a peaceable manner." *T. CA.* § *29-18-101.* Most states, like Tennessee, hold that the existence of a speedy statutory remedy for the removal of tenants who unlawfully remain in possession bars the landlord's entry by self-help. As one Tennessee court commented in 1928: "the remedy of detainer was given in order to preserve the peace and harmony of society, by preventing persons from taking redress into their hands. Cutshaw v. Cutshaw, 3 Tenn. App. 666 (1925). Some courts, growing in number, hold that virtually any nonviolent entry that is made without the express consent to a tenant is an actionable wrong by a landlord. Tennessee law also defines a "forcible entry" to include "entering peaceably and then turning or keeping the party out of possession." *T. CA.* § 29-18-102 *(a).*

If a landlord resorts to self-help, the damages recoverable by the tenant for a wrongful trespass can include not only punitive damages, but the difference between the market value of the premises and the rent fixed in the lease and lost profits, including expenses incurred in order for the tenant to reestablish his business.

The exception to the above rule is if the tenant has clearly and unequivocally abandoned the property. *See,* Jaffe v. Bolton, 817 S.W.2d. 19 (Tenn. App. 1991). The problem in making this decision is that it depends totally on the facts. Unless the landlord is 100% sure that the tenant

has totally abandoned the premises, it is always better to be on the safe side and file an eviction action to obtain legal possession of the premises. If the landlord is wrong, a constructive eviction may occur, which would relieve the tenant from any future rent because the abandonment has been "accepted" by the landlord.

It is also always advisable to write a tenant before a landlord resumes possession of abandoned premises, declaring the tenant to be in default for abandonment, and giving notice of what action the landlord will take within the specified period set out in the lease.

Waiver and Unlawful Detainer

The Tennessee Legislature first passed a forcible entry and detainer statute act in 1851. While actions to evict commercial tenants can be filed in any court (Chancery, Circuit or General Sessions), the vast majority of "detainer warrants" are filed in the General Sessions court of the county where the property is located. The great advantage to filing in General Sessions is the speed by which a landlord can obtain a trial date and recover legal possession of the property. To expedite the process, under Tennessee law a landlord is not limited in the amount of money it can recover from a tenant in a detainer action filed in General Sessions court. General Sessions courts have a jurisdictional limit of up to $25,000.00. However, in detainer actions, jurisdiction is unlimited, and there have been instances where landlords have obtained a $100,000 judgment against a commercial tenant (although this certainly does not ensure collection of the judgment). *See, T.C.A.* § 16-15-*501 (d)(1).*

The process itself is very simple and inexpensive. Just like a residential eviction action, all that is required is to fill out a printed "detainer warrant". The attorney simply fills out the information and files it with the court. A caveat: ensure that the description of property is complete, because if a landlord has to resort to having the Sheriff physically evicting the tenant, the description in the writ

of possession must match the description in the detainer warrant.

Under Tennessee law a detainer warrant can be served upon any adult person found in possession of the premises [and] service of said process upon such party in possession shall be good and sufficient to enable the landlord to regain possession of the property." *T.C.A.* § 29-18-115. Therefore, a commercial landlord can serve a waitress, a cashier or a manager, as long as that individual is an "adult". This applies even if the commercial lessee is an individual. The only problem which might arise is whether or not a judge will allow the landlord to recover not only possession of the property, but a monetary judgment if only a mere employee is served. A landlord must prove that the person served had the authority under his employment to send the detainer warrant to an authorized representative. Some judges do not recognize this distinction. One practical suggestion is to designate on the warrant itself who shall be served with the warrant - normally the manager. Of course, the warrant is not required to be served at the place of business.

When the detainer warrant is served, a trial date is placed on the warrant itself by the Sheriff. The date will usually be ten to fourteen days after service of the warrant. Under Tennessee law, the trial date cannot be set less than six days after service of the warrant. *T.C.A. § 29-18-116.* The Sheriff normally calls the attorney listed on the warrant and informs him of the trial date.

The author of this article has filed, on behalf of commercial landlords, probably 1,000 detainer warrants against commercial tenants over the last thirty-five years. Of these 1,000, probably five have actually gone to trial. The reason for this small number is obvious. There are simply not that many defenses a tenant can assert when rent has not been paid, which accounts for ninety-nine percent (99%) of all detainer warrants. In most instances, the tenant either abandons the property, works out some sort of settlement, or never shows up at trial. One tactic is to convince the tenant prior to trial to agree to a judgment and attempt to work out a settlement, i.e., a payment plan, within

the next few days. If the negotiations break down, judgment has already been obtained and the landlord does not have to return to court.

It also must be emphasized that General Session judges will normally postpone a trial, on the first trial date, for any reason. However, a detainer warrant action, unlike a regular small claims action, can only be continued upon a showing of "good cause". *T.C.A.* § 29-18-118. The definition of "good cause" differs from judge to judge. However, even if "good cause" is shown, the postponement cannot be for more than fifteen (15) days. *Id.* Accordingly, if the' situation arises where immediate repossession of the premises is important, or if the landlord's representative has to travel for the hearing, then the practical advice would be for the landlord's attorney to write to the tenant immediately after service and state that the trial will not be continued for any reason. A copy of the letter should also be sent to the court clerk. This will buttress the attorney's argument, when the trial date arrives, and the tenant makes his argument for a continuance, as to why the trial should not be continued. These actions, however, are no guarantee that the judge will not listen sympathetically to the small, local businessperson and postpone the trial for one week.