

Residential Landlord's Perspective Towards Property Management Law

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UNDERSTANDING PROPERTY MANAGEMENT LAW

Landlord's Perspective RESIDENTIAL

Initial Tenant Interviews and Rental Applications

Initially it must be stated that the selection process is extremely important with regard to avoidance of future problems. Speed and haste to fill a vacancy without properly qualifying an applicant can cause serious problems in the future. Initially, it is important to insure that the property has procedures to document everything that is performed during the application process.

Proper qualification procedures will include written application, check list, interviews, along with credit reports and verification of employment and references. As will be discussed later, criminal investigations are becoming increasingly important and now that many court systems have information on the internet, payment records, prior debts to landlords and eviction records can be assessed by the landlord.

The landlord should establish clear and consistent criteria and the interviews of applicants should be consistent. The application itself should provide authorization to the landlord to obtain credit and criminal background information.

As all landlords know, businesses exist to provide application verification services to the landlord. While these companies may screen and process applications quicker and cheaper than the staff is able, it is important to screen the screener and ensure that this company provides information objectively and not subjectively. The manager and staff should be consistent in their approach and if possible one person should be assigned the duties of screening applicants to prevent different interpretations. Standard forms should be used which would provide documentation of the completeness and fairness of the application process.

Fair Housing Act Compliance

Discrimination is avoided when the landlord establishes reasonable qualifications that are consistently applied to all applicants without regard to membership in a protected status such as race, color, religion, sex (gender), familial status, national origin, age and disability. It is reasonable for the landlord to establish rental qualifications including income requirements, good credit history, good rental history, and a clean criminal background free from convictions. Therefore, an applicant, even a member of a protected class who has a bad rental history can be denied the lease. This is not illegal discrimination. Illegal discrimination occurs when decisions are based on an individual's membership in a protected class.

This does not mean that an occasional exception cannot be made for unusual circumstances. As long as these exceptions are not made in a discrimination fashion and the landlord completes and maintains documentation that include legitimate business reasons for making the exception, then an occasional deviation from established criteria will not be considered discrimination. However, general rule remains that consistency is important when making leasing decisions. All landlords are aware that discrimination based upon an applicant's membership in a protected class is illegal. However, there are subtleties in the law that the landlord should be aware of. An otherwise neutral policy or procedure that has a disproportionately negative impact on a protected class is considered to be discrimination. This is known as disparate impact. The following are practices that are illegal and violate fair housing, refusal to rent, to negotiate, falsely denying that housing is unavailable or making housing unavailable. A landlord cannot refuse a reasonable accommodation to an applicant who has a disability and cannot refuse to allow a disabled resident to make a reasonable modification.

Further, during the application process the landlord does not inquire into the applicant's disability and does not set different terms or conditions for the rental of the dwelling. A landlord shall not provide different housing services nor should the landlord direct an individual to a specific apartment in the community based upon the protected class membership of the applicant. Finally, a landlord should be sure that all advertising does not indicate a discriminatory preference.

Fair Housing does exempt owner occupied buildings with no more than four units. Also, exempted are single family houses sold or rented without a broker. Additionally, houses operated by private organizations and clubs that limit occupancy to their members are exempted. The Housing for Older Persons Act of 1995 provides an exemption and allows certain properties created for older persons to exclude children if all residents are sixty-two (62) years of age or older or eighty percent of the units have at least older person living within its who is fifty-five (55) years of age or older or the Secretary of Housing and Urban Development has determined that the housing is specifically designed and operated to assist elderly persons.

Credit Checks

Initially, it is important to determine who will be the tenant and the lease must be drafted accordingly. If an agent proposes to execute a lease on behalf of a disclosed principal, the authority to do so must be verified. For example, if a Corporation is the named tenant, then the authority of the agent to act on behalf of the Corporation is the named tenant, then the authority of the agent to act on behalf of the Corporation should be documented and a corporate resolution obtained if possible. This documentation is also important if the tenant is a Partnership, Limited Liability Company or in other situations where one party will execute the lease on behalf of another. One spouse is not automatically the agent for the other. Therefore each individual sought to bound must execute the lease. All partners of a partnership should sign the rental contract otherwise personal liability for lease payments cannot be maintained. Possession of the leased premises should be withheld until all proper signatures have been obtained on the contract documents. If possession is given before obtaining all necessary signatures, it is often difficult to later obtain execution of these items.

Landlords have prospective tenants fill out application forms that provide as much background information as possible. Included are previous addresses, names and addresses of past and present employers, salary, work history, marital status, social security number, date of birth and personal and professional references.

Landlords often contact these personal references to verify the information provided to them by the prospective tenant. Normally a landlord would contact the most current landlord and business associate who would be more likely to know how responsible a prospective tenant is.

Landlords typically check the credit history of applicants, the information relating to the credit history of a potential tenant is important in determining how financially responsible the tenant is with money and property and can be used to predict how likely the tenant will pay the rent on time. The credit report is a listing and compilation and analysis of the applicant's payment history with creditors. The report lists accounts that are overdue, current accounts, judgments, liens and other items that have been entered against the applicant. Additionally, personal information is available such as past addresses and employment history. The credit report expense may be charged to the prospective tenant and the applicant has a right to call the credit reporting agency to verify that the landlord ordered the report and to verify the amount of the fee. Therefore, rental applications should include a provision giving the landlord permission to obtain the applicant's credit report. While it is legal for the landlord to charge a reasonable fee for processing the credit check on a prospective tenant, a landlord may not charge such a fee and then not use the funds for the purpose of a credit check. If a landlord requests such a fee but thereafter does not perform the credit check, the advanced fee should be returned to the applicant.

If a landlord declines to lease because of information found in the credit report, Federal law requires that the landlord inform the applicant and provide the applicant with:

1. The name, address and telephone number of the credit reporting agency that provided the information;

2. A statement that the consumer reporting agency did not make the decision to reject the application and cannot supply the applicant with the specified reasons why the application was rejected;
3. Notice that the applicant may obtain a free copy of the credit report if the applicant requests it from the credit reporting agency within 60 days after the application was denied;
4. Notice that the applicant has the right to dispute the accuracy or completeness of the report furnished by the credit reporting agency.

Landlords also perform criminal record checks on prospective tenants. Landlords may refuse to rent to people who have been convicted of serious crimes. In fact, given the trend of the law to impose civil liability upon the landlord based upon criminal activity of tenants or their guests, it is recommended that a background check be commenced and that the specific criteria be maintained by the landlord to determine what type of history would be acceptable.

The landlord should be aware, however, of the Federal Fair Housing Act wherein an applicant's past drug addiction may be considered to be a disability which would negate the landlord's right to refuse to rent to the particular applicant.

A landlord must avoid engaging in discriminatory practices. The application, qualifying criteria, rental standards and procedures cannot be used to discriminate against prospective tenants based upon race, color, religion, sex, national origin, disability, age or familial status.

If a tenant's application qualifies that individual for acceptance, it is discriminatory to fail to offer an individual from a protected class a lease. It is discrimination to use different applications with members of protected classifications. It is discriminatory to fail to process an application for leasing or to fail to communicate an offer accurately to a member of a protected classification. The application cannot be used to discourage any person from inspecting or leasing because of their protected classification. The application cannot contain codes or other devices that would serve to

segregate or reject applicants of a protected classification.

Not only must the landlord avoid discriminating against a potential tenant because of a handicap, but it is unlawful to make inquiry of an applicant to determine whether the applicant has a handicap or to make inquiry as to the nature or severity of a handicap of an applicant. The landlord can inquire into an applicant's ability to meet the requirements of tenancy to determine if the applicant is qualified for a leasehold available only to persons with handicaps or to persons with particular types of handicaps. The landlord is entitled to obtain information concerning whether an applicant is eligible for a preference available to persons with handicaps or persons with a particular handicap. While an applicant's past drug history may constitute a handicap, the landlord is entitled to determine whether an applicant is a current illegal drug abuser and to inquire whether the applicant has been convicted of the illegal manufacture of a controlled substance.

Tennessee statutory law does not address tenant applications. Generally market conditions dictate the extent to which the landlord will use its resources to verify the identity of the tenant and to obtain documentation concerning the tenant's history. As stated previously, while a non-refundable fee can be charged by the landlord to process the application, this fee must relate to the actual expense incurred by the landlord to process the request. Trade Associations may provide rental histories concerning tenants who have previously defaulted with regard to their leasehold obligations. Finally, many courts now provide computer access to litigation records to determine if an applicant has previously defaulted with regard to payment of rent.

Security Deposits

The amount charged to a tenant for his Security Deposit is generally related to market forces rather than a proper assessment of anticipated damages. While in the past it has been standard for a Landlord to obtain a Security Deposit equal to one month's rent, competition between apartment complexes often drives down that sum and research has indicated that the amount of the security deposit is a significant factor in a prospective tenant's decision to lease a particular apartment.

One alternative to a Security Deposit is a non-refundable cleaning fee. As with the application fee this charge will withstand judicial scrutiny as long as the amount bears a reasonable relationship to actual expenses incurred by the Landlord and is not considered to be a penalty.

At the termination of the tenancy the Landlord must inspect the premises and compile a listing of any damage to the unit which is the basis for any charge against the Security Deposit and the estimated dollar cost for repairs. The tenant has the right to inspect the apartment to verify the accuracy of these charges. Both parties shall sign this list which is conclusive evidence of its accuracy. If the tenant refuses to sign the tenant must state specifically in writing those items to which he disagrees. If the tenant has moved the Landlord must mail a copy of this listing to the tenant at his last known mailing address. After mailing such copy to the tenant, the landlord may begin to prepare the unit for occupancy.

All Landlords requiring Security Deposit must deposit them in a bank or lending institution subject to regulation by the United States. All prospective tenants must be informed of the location of this account. Tenants are not entitled to any interest that may be earned from this account. No matter how much the tenant may owe the Landlord for past due rent or damages the Landlord is not entitled to retain any portion of the Security Deposit to defray these losses if the Security Deposit was not placed in a separate account. If a tenant vacates the premises with unpaid rent due and owing the Landlord may remove the deposit from the account and apply it to the unpaid debt.

Based upon a recent amendment to the Landlord Tenant Act; there is no question that Security Deposits are not advanced rentals. Security Deposits exist to cover damages and to cover violations of the lease agreement.

Co-Tenant and Premises Condition Issues

McClung v. Delta Square Ltd Partners/zip, 937 S.W.2d 891 (Tenn. 1996) changed the law in Tennessee concerning the premises owner's responsibility for criminal activity on the property. The Supreme Court held that businesses now have the duty to take reasonable steps to protect clients,

residents and customers from criminal acts if those acts are foreseeable. Courts will now balance the gravity of the potential harm against the burden on the landlord to protect the individuals from harm. Fact issues will be created concerning whether the criminal behavior was foreseeable and what, if any, duty was owed and perhaps breached by the Landlord.

Although the Americans with Disabilities Act protects recovering substance abusers, the ADA does not protect current or active substance abusers. A Landlord should not accept a potential resident who would pose a direct threat to the health and safety of others or who would pose a risk of substantial damage to the property. These individuals are not entitled to a reasonable accommodation under the ADA.

The state of Tennessee provides a registry of sex offenders which should be consulted prior to the approval of an application. Additionally, although it violates fair housing to discriminate against applicants based upon their race, religion or national origin, an applicant can be refused at least based solely upon negative immigration status. If proper documents cannot be produced, the Landlord may legally reject the application. Landlords do not have to lease to anyone who does not meet reasonable, objective, behavior and financial criteria.

Tennessee has imposed upon a Landlord a duty to exercise reasonable care to keep common passageways in good repair. This duty includes the obligation to remove accumulations of snow and ice within a reasonable time period. See *Wilson v. Gables-Tennessee Props., LLC*, 168 S.W.3d 154 (Tenn. Ct. App. 2004). As with all negligence cases, the Landlord's duty to the Tenant hinges on the foreseeable of harm to someone in a plaintiffs position.

THE RESIDENTIAL RENTAL AGREEMENT AND ISSUES IN DRAFTING

Standard Clauses

The term of the lease should be specifically and carefully drafted and any transfer or cancellation privileges should be conspicuously labeled. Additionally, those paragraphs that the Landlord deems to be most important should be initialed by the Tenant. Landlord should always

include a provision that rent shall be payable without demand by the Landlord and that notice of termination for non-payment of rent is specifically waived. If this language is not included in the lease then prior to the filing of a detainer warrant it will be required that the Landlord provide written notice to the tenant of a default. While many Landlords as a matter of policy routinely send late notices to their residents it is not legally necessary assuming that requirement is waived in the lease. The landlord should ensure that a paragraph provides that the landlord is entitled to recover its attorneys fees and all costs and expenses of enforcing the lease. If not the landlord cannot recover these items. Finally, the clause should state that the landlord will recover its fees and expenses and it should not provide that the prevailing party is entitled to the award.

Definitions, Terms and Conditions

The division of responsibility for utilities should also be established and the Landlord should not allow the Tenant to obtain possession of the premises until all the utilities for which the Tenant is to pay have been placed in the name of the Tenant. Outstanding utility bills may be recovered by the Landlord in the same proceeding as unpaid rents but there is no reason for the Landlord to act as a lending institution for the Tenant.

Recently the Landlord Tenant Act was amended and a landlord may terminate existing utility services after three days if service is in the landlord's name and the rental agreement requires the tenant to have the utilities placed in the tenant's name.

All occupants of the apartment should be identified and listed and the Tenant informed that any unauthorized persons who stay permanently with the Lessee provide grounds for eviction. Increasingly, many individuals work out of their homes instead of traveling to offices. While this is convenient it could pose a problem for the Landlord if the Tenant's business results in increased traffic or parking problems. Therefore, unless it is otherwise agreed the Tenant shall occupy the apartment only as a dwelling unit.

The issue of automatic renewals should also be addressed in the lease as it relates to holdover Tenants. Many leases provide that after an initial term the Tenant continues to occupy the leasehold on a month to month basis. Other leases state that unless one party notifies the other to the contrary within a certain time period that the lease is automatically renewed for a like period of time under the same terms and conditions. What should be included in the paragraph dealing with renewal is a business decision that should be made after consideration of market conditions as potential tenants often compare this requirement before making a leasing decision. Assuming that the Landlord obtains a guarantee this guarantee should also provide for continued liability in the event that the lease is extended or renewed. If this is not specifically agreed then a guarantors obligation will cease at the conclusion of the initial lease term. The lease should also include a statement that the Tenant acknowledges receiving and reading the lease and the rules and regulations of the apartment and that the Tenant agrees to abide by them.

The type of pets, if any, that are allowed pursuant to the lease should be carefully delineated and a separate pet deposit and agreement should be executed by the Tenant. Because of liability considerations size and type of animals are important considerations. Tennessee no longer adheres to the one bite rule and the Landlord should never allow a Tenant to harbor a vicious breed or type of pet. If the Landlord does not take appropriate action to insist on this pets removal then liability will be assessed and even though the owner will also be liable it is from the Landlord's resources that judgments are usually paid.

It is important that the Landlord obtains the Tenants current place of employment and banking institution. The Landlord should photocopy the Tenant's first rental payment and thereafter if time permits compare subsequent payments with the original tender. Updated employment information should be maintained by the Landlord as garnishments of wages and executions upon bank accounts are the most effective means of collecting a money judgment against the Tenant. Generally speaking if a Tenant does not have the funds to pay the monthly rent then he will not have

any personal property such as a vehicle which the Landlord could execute upon in order to satisfy an outstanding judgment.

Effect of Unsigned Agreement

If the landlord does not sign a written agreement, acceptance of rent without reservation binds the partners to a month to month tenancy. If a person takes possession without paying rent and fails to sign a lease delivered by the Landlord or who enters without an oral agreement, that person is deemed a trespasser. The person may be evicted and held liable for damages and rent for the term of the trespass and for reasonable attorney's fees. However, if the person pays rent which is accepted then the person becomes a Tenant.

Prohibited Provisions in Residential Rental Agreement

Although exculpatory or limitation of liability clauses are not allowed, the Tenant should still be advised that the Landlord is not the insurer of the Tenant's property and that the Landlord recommends that the Tenant secure adequate insurance. Also prohibited are any paragraphs that authorize a confession of judgment or whereby the Tenant agrees to waive or forego rights and remedies.

Security Deposits

All funds received by the landlord as deposits should be held as security deposits. This is true whether the deposit is entitled security deposit, pet deposit or last months rent deposit. If the rental agreement provides that the tenant is to pay first month's rent or pro-rate and last month's rent at the time of occupancy it should further be detailed in the lease agreement that the landlord is entitled to immediately apply the advanced rental payment towards the last month's rent, otherwise the landlord is required to treat the payment of last month's rent as a security deposit and will be obligated to comply with all the requirements contained in the Uniform Residential Landlord and Tenant Act.

Since a security deposit is not considered an advance rental, likewise an advance rental should not be considered to be a security deposit. Previously, under the Uniform Residential Landlord and Tenant Act, a security deposit was defined as an advanced rental. Fortunately for the landlord this definition has now

been removed from the Landlord and Tenant Act. Currently, security deposit is defined as an escrow payment made to the landlord under the rental agreement for the purpose of securing the landlord against financial loss due to damage to the premises occasioned by the tenant's occupancy other than ordinary wear and tear and any monetary damage due to the tenant's breach of the rental agreement. Further, the term security deposit does not infer that the landlord is providing any service for the personal protection or safety of the tenant beyond that prescribed by law.

Disclosures Required in Rental Agreement

A proper lease should state that rent is payable without demand at the time and place agreed upon by the parties. Further, a provision should be included in the lease whereby notice is specifically waived on the nonpayment of rent by the Tenant. If this waiver is not contained in the lease agreement, then written notice must be provided by the Landlord to the Tenant. If it is not agreed whether rent is to be paid, it is payable at the apartment or dwelling unit and periodic rent is payable at the beginning of the month and in equal monthly installments thereafter.

Under Tennessee law, there is a five day grace period beginning the day the rent was due to the day a fee for the late payment of rent may be charged. The day the rent was due shall be included in the calculation of the five day grace period. However, if the last day of the five day grace period occurs on a Sunday or legal holiday, then the Landlord cannot impose a late charge if the rent is paid on the next business day. Any late fee charged by the Landlord shall not exceed 10% of the amount of rent past due.

ABANDONED PROPERTY

Historically, the common law allowed a remedy of distress involving the self-help of a landlord. A landlord could retain the personal property of the tenant if the tenant owed back rent. If the landlord obtained possession of the tenant's personal property, then the landlord could sell such property and apply it to any rents owed. There is no evidence that this remedy is available for use in Tennessee.

In Tennessee, whether commercial or residential, a landlord would need to go through the detainer process, obtain a judgment, and then file the necessary Writ to execute on a tenant's property.

One possible alternative for the landlord may be to include an express provision in the lease to acquire a valid lien on the tenant's property to secure payment of rent or performance of other lease obligations. This lien would be a contractual lien instead of a statutory lien. Beware that contractual liens are generally not favored by the law and provisions of such are generally strictly construed against the lessor. The lease terms would determine what properties the tenant would be subject to the lien, possibly including fixtures. This lien is personal to the tenant and would not attach property of third parties, assignees or sub-leasees.

Contractual liens are generally considered chattel mortgages and are security interests under Article 9 of the Uniform Commercial Code. Therefore, enforcement of said liens would be governed by the UCC. Be further advised that although the code permits a secured party to take possession of collateral upon default without resorting to judicial process, the trend in recent decisions is to require the landlord to proceed through the proper legal or equitable action to enforce the contractual lien even if the lease authorizes self-help.

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 the 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.

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