



**BOYAR & MILLER**

**South Texas College of Law  
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**Why Doesn't My Key Work?  
Landlord Commercial Lease Remedies: A Current View**  
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**LANDLORD COMMERCIAL LEASE  
REMEDIES: A CURRENT VIEW**

**A. Landlord's Remedies.**

1. Common Law Remedies for Breach of an Express Covenant.

The common law theory of independent covenants in leases, at first glance, required little of landlords while providing them significant security; the landlord needed only to deliver the right of possession and, in return, the tenant was required to pay rent to the landlord for as long as he retained possession. *Davidow v. Inwood N. Prof. Group*, 747 S.W.2d 373, 375 (Tex. 1988). A tenant was obligated to pay rent, even if the leasehold's buildings were destroyed or the landlord breached a lease covenant. *Id.* This concept was premised on the fact that the "tenant still retained everything he was entitled to under the lease—the right of possession." *Id.*

The common law theory of independent covenants cut both ways, however, and a tenant's failure to pay rent did not excuse the landlord from honoring the covenant of quiet enjoyment. *Buffalo Pipeline Co. v. Bell*, 694 S.W.2d 592, 598 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.). Thus, at common law, a landlord did not have the right to re-enter the premises or terminate the tenant's right to possession unless the lease provided such remedies or the tenant anticipatorily repudiated the lease. *Id.* (citing *Grubb v. McAfee*, 212 S.W. 464, 467 (Tex. 1919)). Absent an express provision in the lease of a power of re-entry or forfeiture, a tenant's breach of the express covenant to pay rent did not result in a forfeiture of the lease; instead, the landlord's remedy was solely for damages. *Id.*

2. Common Law Remedies for Anticipatory Breach.

Texas courts traditionally provided landlords with four types of remedies for a tenant's abandonment or breach of a lease. *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293, 300 (Tex. 1997). First, the landlord could maintain the lease and sue for rent as it became due. *Id.* Second, the landlord could treat the breach as an anticipatory repudiation, repossess, and sue for the present value of future rentals less the reasonable cash market value of the property. *Id.* Third, the landlord could treat the breach as anticipatory, repossess and release the property, and then sue for the difference between the contractual rent and the amount received from the new tenant. *Id.* Finally, the landlord could declare the lease forfeited (if expressly allowed by the lease) and relieve the tenant of liability for future rent. *Id.* The Texas Supreme Court and the Texas Legislature have since discarded the first option to require a landlord to make reasonable efforts to mitigate its damages. *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299; *see also* TEX. PROP. CODE 91.006.

3. Present Day Remedies.

a. Electing a Remedy.

Today, a landlord may seek any of the three foregoing remedies for a tenant's default, or almost any remedy contracted to by the parties. *Speedee Mart, Inc. v. Stovall*, 664 S.W.2d 174, 177 (Tex. App.—Amarillo 1983, no writ). However, a landlord may choose only one remedy and, as a result, a landlord may recover only one type of damages. *Lakeside Leasing Corp. v. Kirkwood Atrium Office Park*, 750 S.W.2d 847, 852 (Tex. App.—Houston [14th Dist.] 1988, no writ). For example, a landlord that

chooses to repossess and retain a property (thereby electing to treat the tenant's conduct as an anticipatory breach) is limited to a measure of damages equaling the present value of the rentals that accrued under the lease contract reduced by the reasonable cash market value of the lease for the unexpired term. *Speedee Mart, Inc. v. Stovall*, 664 S.W.2d at 177-78. A landlord may also be bound by a contractual remedy if the lease contract specifically provides for only one remedy and states that this is the only remedy. *Bifano v. Young*, 665 S.W.2d 536, 539 (Tex. App.—Corpus Christi 1983, ref.'d n.r.e.). Of note, a lease contract's stated remedy may also be permissive, rather than mandatory. *Id.* The mere fact that a lease contract contains a particular remedy does not necessarily mean that such remedy is exclusive. *Id.*<sup>1</sup>

A landlord may treat a tenant's abandonment of property as an anticipatory breach, terminate the lease and repossess and retain the property. See *Crabtree v. Southmark Commercial Mgmt.*, 704 S.W.2d 478, 480 (Tex. App.—Houston [14<sup>th</sup> Dist.], writ ref'd n.r.e.). When the tenant has abandoned the premises and ceased paying rent, the landlord may also terminate the lease and declare it to be forfeited, releasing the tenant of all liability under the lease. See *Rohrt v. Kelley Mfg. Co.*, 349 S.W.2d 95, 99 (Tex. 1961).

In addition, the landlord's right to possession may be waived where the landlord fails to pursue enforcement of the judgment and continues to accept rent. *Housing Auth. of the City of Corpus Christi v. Massey*, 878 S.W.2d 624 (Tex. App.—Corpus Christi 1994, no writ). Another potential waiver of the landlord's right to pursue the eviction action involves the past

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<sup>1</sup> The measure of damages is discussed further *infra* Section C.

acceptance of late rent payments. *Struve v. Park Place Apartments*, 923 S.W.2d 50 (Tex.App.—Tyler 1995, writ denied) (landlord must refuse tendered rent to avoid invalidating its notice of termination). However, a nonwaiver clause in the tenant's lease may eliminate the waiver and allow the landlord to proceed with the eviction. *Straus v. Kirby Court Corp.*, 909 S.W.2d 105 (Tex. App.—Houston [14th Dist.] 1995, writ denied); *but see, Zwick v. Lodewijk Corp.*, 847 S.W.2d 316 (Tex. App.—Texarkana 1993, no writ).

#### b. The Duty to Mitigate.

Under the common law approach, a landlord was under no duty to mitigate its damages based on the concept that a tenant was liable for rent for as long as the tenant had a right to possess the land. *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 295-96. Thus, a landlord could recover rent for the remainder of a lease's term without any obligation to act following a tenant's abandonment of the premises. *Id.* at 296. In 1997, the Texas Supreme Court rejected this traditional property law principle in favor of a duty to mitigate that would, in turn, discourage economic waste, prevent the destruction of leased property, and continue the trend of "disfavoring contract penalties." *Id.* at 298.

That same year, the Texas Legislature codified the mitigation rule, providing that: "(a) A landlord has a duty to mitigate damages if a tenant abandons the leased premises in violation of the lease;" and "(b) A provision of a lease that purports to waive a right or to exempt a landlord from a liability or duty under this section is void." TEX. PROP. CODE 91.006.

The Texas Legislature then went one step further, providing that any "provision of

a lease that purports to waive a right or to exempt a landlord from a liability or duty under this section is void.” *Compare Id.*, with *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299 (holding that a commercial landlord and tenant could contract to excuse the requirement of mitigating damages.).

The landlord’s duty to mitigate requires the use of “objectively reasonable efforts to fill the premises when the tenant vacates in breach of the lease.” *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299. Mitigation, however, is not an absolute duty. *Id.* The Texas Supreme Court noted that a “landlord is not required to simply fill the premises with any willing tenant; the replacement tenant must be suitable under the circumstances.” As important, a landlord’s failure to mitigate does not give rise to a cause of action by a tenant. *Id.* Instead, a landlord’s failure to mitigate damages will prevent recovery by a landlord “only to the extent that damages reasonably could have been avoided.” *Id.* In addition, the tenant bears the burden of proof to show the landlord failed to mitigate damages, as well as the amount by which the landlord failed to reduce its damages. *Id.*

## **B. Landlord’s Right to Rent and Damages.**

### **1. Rent.**

Following a tenant’s breach and abandonment, the landlord may maintain the lease and sue as rent becomes due. *Austin Hill Country Realty*, 948 S.W.2d at 300. When a landlord exercises this option, the duty to mitigate only arises if: (1) the landlord reenters, or (2) the lease allows the landlord to reenter the premises without accepting surrender, forfeiting the lease, or being construed as evicting the tenant. *Id.* (citing *Robinson Seed & Plant Co. v. Hexter*

& *Kramer*, 167 S.W. 749, 751 (Tex. App.—Dallas 1914, writ ref’d). Thus, a suit for anticipatory repudiation, actual reentry, or a contractual right of reentry gives rise to the landlord’s duty to mitigate damages upon the tenant’s breach and abandonment. *Austin Hill County Realty*, 948 S.W.2d at 300.

### **2. Damages.**

A landlord may elect to sue for damages for a tenant’s anticipatory breach without reletting, and without exercising any diligence to do so. In such a case, the measure of damages is the difference between the present value of the contracted rental amount and the reasonable cash market value of the lease for its unexpired term. *Thomas v. Morrison*, 537 S.W.2d 274, 278 (Tex. App.—El Paso 1976, writ ref’d n.r.e.). A landlord may also accept the breach by the tenant, retake possession and sue for damages. *Thomas*, 537 S.W.2d at 278 (citing *Marathon Oil Co. v. Rone*, 83 S.W.2d 1028, 1031 (Tex. App.—Fort Worth 1935, writ ref.’d). If the landlord elects this remedy and relets the premises for the entire unexpired term, the measure of damages is generally the difference between the rental originally contracted for and that realized from the reletting. *Thomas*, 537 S.W.2d at 278.

In order to claim a property has a fair market value of zero, a landlord must allege more than an inability to sell or lease the property. *Douglas v. W. Ala., Ltd.*, 722 S.W.2d 736, 738 (Tex. App.—Houston [14th Dist.] 1986, no writ). However, affirmative testimony that a space could not be relet at any price might be sufficient. *Id.* (holding that a space might have a fair market value of zero if the landlord had testified that it could not re-let the space *at any price*). Turning to the calculation of a

present value discount rate, specific evidence of the present value discount rate is not required. *Marshall v. Telecommuns. Specialists, Inc.*, 806 S.W.2d 904 (Tex. App.—Houston [1st Dist.] 1991, no writ).

### 3. Liquidated Damages.

Commercial leases that contain provisions stating a parties' failure to perform will result in a stipulated calculation or amount of damages are known as liquidated damages clauses. Such clauses will be enforced if: (1) the harm caused by the breach is incapable or difficult of estimation, and (2) that the amount of liquidated damages is a reasonable forecast of just compensation. *Phillips v. Phillips*, 820 S.W.2d 785, 788 (Tex. 1991); *see also Stewart v. Basey*, 245 S.W.2d 484, 487 (Tex. 1952) (analyzing a liquidated damages clause in the context of a lease contract). At the heart of a liquidated damage's reasonableness is the court's effort to award neither less nor more than a parties' actual damages. *Phillips*, 820 at 788 (internal quotations omitted).

The party resisting enforcement bears the burden to prove the invalidity of a liquidated damages provision. *Murphy v. Cintas Corp.*, 923 S.W.2d 663, 666 (Tex. App.—Tyler 1996, writ denied). Whether a liquidated damages clause is enforceable is a question of law for the court to decide. *Id.* In most cases, the resisting party must plead the liquidated damages clause amounts to a penalty as an affirmative defense. *Phillips*, 820 S.W.2d at 789. However, the resisting party is excused from pleading penalty as an affirmative defense if the penal nature of the clause is apparent from the pleadings; for example, if the resisting party pleads illegality on its face or unenforceability as against public policy. *Id.*

## C. **Landlord's Right to Repossess the Premises.**

### 1. Common Law Self-Help Eviction.

At common law, provisions in a lease that provide a landlord the right to reenter on default of a tenant without notice or consent, and even over a tenant's protest, are valid so long as these rights are exercised peaceably and without force or violence. *Gulf Oil Corp. v. Smithey*, 426 S.W.2d 262, 265 (Tex. App.—Dallas 1968, writ dism'd). However, if the landlord's action in excluding the tenant from the premises was a wrongful eviction, such as an exercise of dominion over the tenant's property, a cause of action for conversion or wrongful eviction may exist. *Cox's Bakeries of N. D., Inc. v. Hammant Dev. Corp.*, 515 S.W.2d 326, 329 (Tex. App.—Dallas 1974, no writ). The other key consideration for self-help eviction is whether the repossession was peaceable and without force or violence. *See Houck v. Kroger Co.*, 555 S.W.2d 803, 806 (Tex. App.—Houston [14th Dist.] 1977, writ ref d n.r.e.) (warning against "actions calculated to endanger [ ] parties, their employees and others innocently in the vicinity").

### 2. Statutory Self-Help Eviction.

Chapter 93 of the Texas Property Code authorizes a landlord to change the door lock of a tenant who is delinquent in paying rent. However, the landlord must place a written notice on the tenant's front door stating the name and address or telephone number of the individual or company from which the new key may be obtained. The new key must then be provided during the tenant's regular business hours and only if the tenant pays the delinquent rent. TEX. PROP. CODE § 93.002(c)(3) and (f) (Vernon Supp. 2003).

Of additional note, the Texas Property Code expressly states that a “lease supersedes this section to the extent of any conflict.” *Id.* at § 93.002(h).

If a landlord or a landlord’s agent violates this section, the tenant may: (1) either recover possession or terminate the lease; and (2) recover from the landlord an amount equal to the tenant’s actual damages, one month’s rent or \$500, whichever is greater, reasonable attorney’s fees, and court costs, less any delinquent rents or other sums for which the tenant is liable to the landlord. *Id.* at § 93.002(g). A tenant may also recover possession of the leased premises if the landlord locked out the tenant in violation of Section 93.002. *Id.* at § 93.003(a). These remedies are not mutually exclusive; a tenant’s right to recover possession does not affect the tenant’s right to recovery under Section 93.002, nor does it affect the rights of the parties in a forcible detainer action. *Id.* at § 93.003(j) and (m). Conversely, if a tenant files a sworn complaint for reentry in bad faith resulting in a writ of reentry being served on the landlord, the landlord may seek from the tenant an amount equal to actual damages, one month’s rent or \$500, whichever is greater, reasonable attorney’s fees, and costs of court, less any sums for which the landlord is liable to the tenant. *Id.* at § 93.003(k).

### 3. Judicial Eviction.

#### a. Forcible Entry and Detainer.

Chapter 24 of the Texas Property Code enables a landlord to institute an eviction suit in justice court and seek possession of a property.<sup>2</sup> A “forcible entry and detainer” occurs when a party enters the

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<sup>2</sup> Additional statutory provisions regarding forcible detainer suits are included in **Appendix A**.

real property of another without legal authority or by force and refuses to surrender possession on demand. TEX. PROP. CODE § 24.001(a) (Vernon 2000). A “forcible detainer” may conversely occur when a party: (1) is a tenant or a subtenant wilfully and without force holding over after the termination of the tenant’s right of possession; (2) is a tenant at will or by sufferance, including an occupant at the time of foreclosure of a lien superior to the tenant’s lease; or (3) is a tenant of a person who acquired possession by forcible entry. TEX. PROP. CODE § 24.002(a) (Vernon 2000).

Jurisdiction over forcible detainer suits lies exclusively with the justice court in the precinct in which the real property is located. TEX. PROP. CODE § 24.004 (Vernon 2000); *see McGlothlin v. Kliebert*, 672 S.W.2d 231, 232 (Tex. 1984); *Mitchell v. Armstrong Capital Corp.*, 911 S.W.2d 169, 171 (Tex. App.—Houston [1st Dist.] 1995, writ denied). Such suits are intended to provide a speedy, simple and inexpensive means to determine the right of actual possession; thus, the merits of title to the property, as well as affirmative defenses, are not the subject of inquiry. TEX. R. CIV. P. 746; *see also Lopez v. Sulak*, 76 S.W.3d 597, 604 (Tex. App.—Corpus Christi 2002, no pet.). A suit for rent, however, may be joined with an action of forcible entry and detainer. TEX. R. CIV. P. 738.

A forcible detainer suit “does not bar a suit for trespass, damages, waste, rent or mesne profits.” TEX. PROP. CODE § 24.008 (Vernon 2000). Further, forcible entry and detainer action are “not exclusive, but cumulative of any other remedy that a party may have in the courts of this state.” *McGlothlin*, 672 S.W.2d at 233. Thus, either party may maintain an action in a court of competent jurisdiction for any disputes

between the parties that are not within the justice court's limited subject matter jurisdiction. *Id.*

b. Procedure.

Prior to filing a suit for eviction, the landlord must give at least three days written notice to a tenant to vacate the premises. TEX. PROP. CODE § 24.005(a) (Vernon 2000). The parties may contract, however, for a shorter or longer notice period in the written lease or agreement. *Id.* In addition, a landlord who files a forcible detainer suit based on the tenant's wrongful holdover must also comply with the tenancy termination requirements of Section 91.001. *Id.* Section 24.005 also provides the proper method of notice to the tenant. *Id.* at § 24.005(f) and (g) (Vernon 2000). The landlord may also include a demand for payment of delinquent rent or vacate if prior notice that rent is due and unpaid has been given to the tenant. *Id.* at § 24.005(i).

Once the forcible detainer is filed, the justice must immediately issue citation to the defendant to appear not more than ten days and not less than six days from the date of service of the citation. TEX. R. CIV. P. 741.

c. Representation and the Elements of Proof at Trial.

A forcible detainer action is tried like any other case in the justice court. TEX. R. CIV. P. 743. Of note, the parties may represent themselves if the ground for eviction is nonpayment of rent or wrongful holdover beyond the rental term. TEX. PROP. CODE § 24.011; TEX. R. CIV. P. 747a. The elements of proof of a forcible detainer action are: (1) the landlord's right to possession of the property; (2) the tenant's unlawful occupation or possession of the

property; (3) the landlord made a statutorily proper demand for possession; and (4) the tenant refused to surrender possession. TEX. R. CIV. P. 741; see also *Middleton v. Crestar Mortg. Corp.*, No. 03-99-00604-CV, (Tex. App.—Austin March 23, 2000, no pet.) (not designated for publication), 2000 WL 298694. Additionally, the complaint must sufficiently describe the property. *Id.*

d. Attorneys' Fees and Court Costs.

A landlord is entitled to recover reasonable attorney's fees from the tenant if the landlord provided proper notice to the tenant or if the written lease entitles the landlord to recover attorney's fees. TEX. PROP. CODE § 24.006(b) (Vernon 2000). Additionally, the prevailing party may recover court costs. *Id.* at § 24.006(d).

e. Judgment and Writ of Possession.

A prevailing landlord in an eviction suit is entitled to a judgment for possession and a writ of possession, as well as costs and damages. TEX. PROP. CODE § 24.0061 (Vernon 2000); TEX. R. CIV. P. 748. A prevailing tenant is similarly entitled to costs and damages. TEX. R. CIV. P. 748.

4. Appeal.

Either party may appeal a final judgment in a forcible detainer action, although neither party may file a motion for a new trial. TEX. R. CIV. 749. An appeal in a forcible detainer action is by trial de novo in county court. *Cattin v. Highpoint Vill. Apartments*, 26 S.W.3d 737 (Tex. App.—Fort Worth 2000, pet. dismissed w.o.j.). An appeal is perfected when an appeal bond has been timely filed in conformity with Rule 749 (within five days of the judgment), or a

pauper's affidavit approved in conformity with Rule 749a. TEX. R. CIV. P. 749c. A court will not grant a default judgment without first showing substantial compliance with Rule 749. TEX. R. CIV. P. 749. A form for the appeal bond is located at Rule 750. TEX. R. CIV. P. 750. The timing, requisite showing, and procedure for opposing this method are set out in Texas Rule of Civil Procedure 749a. *See also* TEX. PROP. CODE § 24.0052(a). A tenant who appeals an adverse judgment in a forcible detainer case by filing a pauper's affidavit based on nonpayment of rent is generally allowed possession of the premises pending appeal. TEX. R. CIV. P. 749b. However, the tenant must pay rent into the registry of the court as it becomes due. TEX. PROP. CODE § 24.0053 (detailing the methods and timing for payment of rent during an appeal).

a. Trial de Novo in County Court.

When the appeal is perfected by an appeal bond or pauper's affidavit, all further proceedings on the judgment are suspended. TEX. R. CIV. P. 751. The justice must forward a transcript of the proceedings to the clerk of the county court with jurisdiction over the appeal. *Id.* The clerk then docket the cause for a de novo trial and notifies both parties of the date of receipt of the transcript and the case docket number. *Id.* Once the transcript is filed in the county court for eight days, trial may take place. TEX. R. CIV. P. 753. If the defendant filed a written answer in the justice court, that answer constitutes the defendant's appearance and answer in the county court. *Id.* However, if the defendant fails to answer in writing in the justice court or within eight days after the transcript is filed in the county court, a default judgment may be entered. *Id.*

Rule 216 of Texas Rules of Civil Procedure governs the procedure for requesting a jury trial. *Collins v. Cleme Manor Apartments*, 37 S.W.3d 527, 531 (Tex. App.—Texarkana 2001, no pet.) These rules raise a possible conflict between a trial date set with less than thirty days notice (possibly as little as eight days) and a rule that requires thirty days notice for a demand for a jury trial. *Id.* at 531-32. Thus, a court can grant a jury trial request despite a party's failure to meet the thirty day notice requirement. *Id.* at 532 (noting that granting of a jury trial would not have harmed the opposing party, disrupted the court's docket, or impeded the ordinary handling of the court's business).

The parties may plead, prove and recover damages, if any, suffered while withholding or defending possession of the premises during the appeal. TEX. R. CIV. P. 752. Damages include, but are not limited to, loss of rents during the appeal and attorneys' fees in justice and county courts, provided the notice provisions in Section 24.006 of the Property Code have been met. *Id.* Only the prevailing party in the county court action shall be entitled to recover any damages. *Id.* An award of damages under Rule 752 is not limited to the jurisdictional limits of the justice court, although such limits apply to rental accruing prior to the judgment in the justice court. *See Carison's Hill County Beverage v. Westinghouse Rd. Joint Venture*, 957 S.W.2d 951, 954 (Tex. App.—Austin 1997, no pet.).

b. Judgment in County Court and Further Appeal.

Following judgment in the county court on appeal, the clerk issues a writ of possession or execution according to the judgment rendered. TEX. R. CIV. P. 755. A writ of possession may not be suspended or



superseded by appeal unless the property is being used for residential purposes only. TEX. PROP. CODE § 24.007 (Vernon 2000). The county court judgment may not be stayed pending appeal unless the appellant files a supersedeas bond in an amount set by the county court within ten days of the judgment. *Id.*

#### **D. Res Judicata and Collateral Estoppel.**

##### 1. General Rules.

Res judicata, also known as claim preclusion, prevents the relitigation of *claims* that have been or, with the use of diligence, should have been litigated in a prior suit. *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992). The elements are: (1) a prior final judgment on the merits; (2) an identity of parties or those in privity with them; and (3) a second action based on the claims that were raised or could have been raised in the first action. *Amstadt v. US. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996). Issue preclusion, or collateral estoppel, prevents the relitigation of particular *issues* that have already been resolved in a prior suit. *Barr*, 837S.W.2d 627, 629. To prove issue preclusion, a party must establish “(1) the facts sought to be litigated in the first action were fully and fairly litigated in the prior action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action.” *Eagle Props., Ltd. v. Scharbauer*, 807 S.W.2d 714, 721 (Tex. 1990).

##### 2. Statutory Exception.

An important statutory exception exists regarding matters litigated in justice courts. Under the Texas Civil Practice and Remedies Code, “[a] judgment or a

determination of fact or law in a proceeding in a lower trial court is not res judicata and is not a basis for collateral estoppel to a judgment in a proceeding in a district court, except that a judgment rendered in a lower trial court is binding on the parties thereto as to recovery or denial of recovery.” TEX. CIV. PRAC. & REM. CODE § 31.004(a) (Vernon 1997). A “lower trial court” consists of a “justice of the peace court, a county court, or a statutory county court” *Id.* Similarly, a judgment in a justice court proceeding is not res judicata in a county court or statutory county court proceeding. *Id.* at § 31.005. As a result, res judicata does not bar related claims that could have been litigated in the lower trial court. *See, e.g., Wren v. Gusnowski* 919 S.W.2d 847, 849 (Tex. App.—Austin 1996, no writ).

##### 3. Effect of Exception.

A judgment granting possession in a detainer suit “does not determine the ultimate rights of the parties with respect to any other issue in controversy regardless of whether this other issue results in a change of possession of the premises.” *Johnson v. Highland Hills Drive Apartments*, 552 S.W.2d 493, 495-96 (Tex. App.—Dallas 1977, writ ref’d n.r.e.). Thus, a “tenant deprived of possession by a non-appealable county court judgment in an appeal of a forcible detainer action is not estopped from seeking recovery for wrongful termination of the lease in another suit.” *Anarkali Enters., Inc. v. Riverside Drive Enters., Inc.*, 802 S.W.2d 25, 27 (Tex. App.—Fort Worth 1990, no writ).

#### **E. Liens.**

A landlord has a number of available alternatives to seize nonexempt property to secure payment for rent or to dispose of a tenant’s personal property, including: (1) a

contractual landlord's lien for foreclosure on the property; (2) enforcement of the landlord's statutory lien under the Texas Property Code; (3) treatment of the property as abandoned under the Texas Property Code; or (4) handling the disposition of the personal property through the judicial eviction process.

#### 1. Contractual Landlord's Lien.

A contractual landlord's lien may provide a self-help remedy that allows the landlord to seize and sell a tenant's property. TEX. PROP. CODE 54.044(b); *Myers v. Ginsburg*, 735 S.W.2d 600, 604 (Tex. App.—Dallas 1987, no writ). A contractual landlord's lien is not enforceable, however, unless it is underlined or printed in conspicuous bold print in the lease agreement. TEX. PROP. CODE 54.043. In addition, a landlord may not hold the property indefinitely without sale, credit, or payment of any surplus that exceeds the amount due for rent. *Id.* Instead, the landlord must credit any sale proceeds, or the value of the property, to the tenant and pay any additional surplus. *Id.* Of note, a contractual lien is subject to Article 9 of the Uniform Commercial Code. *Bank of N. Am. v. Kruger*, 551 S.W.2d 63, 65 (Tex. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.).

A party may take possession without judicial process if it can be accomplished without breaching the peace. TEX. BUS. & COMM. CODE § 9.609 (Vernon 2002). So long as every aspect of the disposition of collateral is commercially reasonable, the landlord may dispose of the collateral by public or private proceedings, and at any time and place and on any terms. *Id.* at § 9.610(b) (Vernon 2002). In addition, the landlord must leave written notice of entry and an itemized list of the items removed immediately after seizing property. TEX.

PROP. CODE 54.044(b). The notice and list must be left in a conspicuous place and state the amount of delinquent rent owed and contact information to enable the tenant follow up regarding the amount owed. *Id.* Finally, the notice must state that the property will be returned upon full payment of the delinquent rent. *Id.*

If a tenant refuses to surrender personal property without breaching the peace, the landlord “may obtain judicial process to aid in effecting possession.” *Hubbard v. Lagow*, 576 S.W.2d 163, 165 (Tex. App.—Austin 1979, writ ref'd). This “judicial process” may include the issuance of a writ of sequestration or a temporary injunction to preserve the collateral. TEX. CIV. PRAC. & REM. CODE § 62.002 (Vernon 1997); TEX. R. CIV. P. 696, *Surko Enter., Inc. v. Borg-Warner Acceptance Corp.*, 782 S.W.2d 223, 224-25 (Tex. App.—Houston [1st Dist.] 1989, no writ). Among the advantages of a contractual landlord's lien over a statutory landlord's lien under the Texas Property Code are the ability to foreclose without judicial proceedings and the lack of personal property exemptions.

#### 2. Statutory Landlord's Lien.

A landlord of a nonresidential building has a preference lien on the property of the tenant or subtenant in the building to secure payment for rent due or to become due. TEX. PROP. CODE § 54.021 (Vernon 1995). Generally, the lien attaches automatically to all non-exempt personal property of a tenant in the building. *Id.* at § 54.023. Exempt personal property includes: clothes, tools or books of a profession, schoolbooks; a family library or family pictures; one couch, two living room chairs, and a dining table and chairs; beds and bedding; kitchen furniture and utensils; food; medicine; one car and one truck;

agricultural implements; children's toys; goods the landlord knows are not owned by a the tenant; and goods the landlord knows are subject to a recorded chattel mortgage or financing agreement. *Id.* § 54.042.

If a tenant owes rent, is about to abandon the building, or is about to remove the tenant's property from the building, a landlord may enforce a statutory landlord's lien through an application to the justice of the peace for a distress warrant. TEX. PROP. CODE § 54.025 (Vernon 1995). The procedures for obtaining distress warrants are located at Texas Rules of Civil Procedure 610 through 620, and these procedures are in keeping with the tenant's constitutional due process rights.<sup>3</sup> See *Lincoln Ten, Ltd. v. White*, 706 S.W.2d 125, 128-29 (Tex. App.—Houston [14th Dist.] 1986, no writ) (orig. proceeding). Of note, an action to foreclose a statutory lien as to an abandoning tenant must commence within one month. See TEX. PROP. CODE § 54.024 (Vernon 1995).

#### **F. Unwanted Property of the Tenant**

The Texas Property Code sets forth the procedure for a landlord that wants to simply remove the tenant's personal property. Upon the issuance of a writ of possession, the officer executing the writ must instruct the tenant or allow the landlord to remove all of the tenant's personal property. TEX. PROP. CODE § 24.0061(d)(2) (Vernon 2000). The officer is further instructed to remove the personal property to a nearby location, "but not blocking a public sidewalk, passageway, or street and not while it is raining, sleeting, or snowing." *Id.* at § 24.0061(d)(2)(D) (Vernon 2000).

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<sup>3</sup> Additional statutory provisions regarding distress warrants are included as **Appendix B**.

The sheriff or constable who executed the writ, at his or her discretion, may engage the services of a bonded warehouseman to remove and store, subject to applicable law, part or all of the property at no cost to the landlord or the officer executing the writ. TEX. PROP. CODE § 24.0061 (Vernon 2000). The officer may not require the landlord to store the property. *Id.* If the property is removed and stored in a public warehouse, the warehouseman has a lien on the property to the extent of any reasonable storage and moving charges incurred by the warehouseman. *Id.* at § 24.0062(a) (Vernon 2000). The officer must notify the tenant of the removal and storage, advising of the circumstances under which the tenant may redeem the property. *Id.* at § 24.0062(b) (Vernon 2000). Any sale of the property shall be conducted in accordance with sections 7.210, 9.301-9.318, and 9.501-9.507 of the Texas Business and Commerce Code. *Id.* at § 24.0062(j). Prior to any sale, the tenant may file suit to recover all of the property moved or stored on the grounds that the warehouseman's moving or storage charges are not reasonable. *Id.* at § 24.00620).

This method of disposing of a tenant's personal property is more expensive, but it has the benefit of protecting the landlord from any claims regarding the handling of the tenant's personal property, such as conversion, so long as the eviction is not later held to be wrongful. See *Campos v. Mv. Mgmt. Prop., Inc.*, 917 S.W.2d 351, 354-55 (Tex. App.—San Antonio 1996, writ denied) (landlord did not convert the tenant's personal property because the landlord was legally authorized pursuant to writ of possession).

The Texas Property Code offers another alternative to handling the personal property left behind by a tenant. "A

landlord may remove and store any property of a tenant that remains on the premises that are abandoned.” TEX. PROP. CODE 93.002(e) (Vernon 1995). A presumption of abandonment exists if a substantial enough amount of goods, equipment, or other property has been removed in an amount to indicate a probable intent to abandon the premises. *Id.* at § 93.002(d). “The landlord may dispose of the stored property if the tenant does not claim the property within 60 days after the date the property is stored.” *Id.* To do so, “[t]he landlord shall deliver by certified mail to the tenant at the tenant’s last known address a notice” stating that the landlord may dispose of the property if the tenant does not claim the property within 60 days after the date the property is stored. *Id.*

## APPENDIX A

### **TEX. R. CIV. P. 739. Citation.**

When the party aggrieved or his authorized agent shall file his written sworn complaint with such justice, the justice shall immediately issue citation directed to the defendant or defendants commanding him to appear before such justice at a time and place named in such citation, such time being not more than ten days nor less than six days from the date of service of the citation.

The citation shall inform the parties that, upon timely request and payment of a jury fee no later than five days after the defendant is served with citation, the case shall be heard by a jury.

### **TEX. R. CIV. P. 742. Service of Citation.**

The officer receiving such citation shall execute the same by delivering a copy of it to the defendant, or by leaving a copy thereof with some person over the age of sixteen years, at his usual place of abode, at least six days before the return day thereof; and on or before the day assigned for trial he shall return such citation, with his action written thereon, to the justice who issued the same.

### **TEX. R. CIV. P. 742a. Service by Delivery to Premises.**

If the sworn complaint lists all home and work addresses of the defendant which are known to the person filing the sworn complaint and if it states that such person knows of no other home or work addresses of the defendant in the county where the premises are located, service of citation may be by delivery to the premises in question as follows:

If the officer receiving such citation is unsuccessful in serving such citation under

Rule 742, the officer shall no later than five days after receiving such citation execute a sworn statement that the officer has made diligent efforts to serve such citation on at least two occasions at all addresses of the defendant in the county where the premises are located as may be shown on the sworn complaint, stating the times and places of attempted service. Such sworn statement shall be filed by the officer with the justice who shall promptly consider the sworn statement of the officer. The justice may then authorize service according to the following:

(a) The officer shall place the citation inside the premises by placing it through a door mail chute or by slipping it under the front door; and if neither method is possible or practical, the officer shall securely affix the citation to the front door or main entry to the premises.

(b) The officer shall that same day or the next day deposit in the mail a true copy of such citation with a copy of the sworn complaint attached thereto, addressed to defendant at the premises in question and sent by first class mail;

(c) The officer shall note on the return of such citation the date of delivery under (a) above and the date of mailing under (b) above; and

(d) Such delivery and mailing to the premises shall occur at least six days before the return day of the citation; and on or before the day assigned for trial he shall return such citation with his action written thereon, to the justice who issued the same.

It shall not be necessary for the aggrieved party or his authorized agent to make request for or motion for alternative service pursuant to this rule.

**TEX. PROP. CODE § 24.005. Notice to Vacate Prior to Filing Eviction Suit.**

(a) If the occupant is a tenant under a written lease or oral rental agreement, the landlord must give a tenant who defaults or holds over beyond the end of the rental term or renewal period at least three days' written notice to vacate the premises before the landlord files a forcible detainer suit, unless the parties have contracted for a shorter or longer notice period in a written lease or agreement. A landlord who files a forcible detainer suit on grounds that the tenant is holding over beyond the end of the rental term or renewal period must also comply with the tenancy termination requirements of Section 91.001.

(b) If the occupant is a tenant at will or by sufferance, the landlord must give the tenant at least three days' written notice to vacate before the landlord files a forcible detainer suit unless the parties have contracted for a shorter or longer notice period in a written lease or agreement. If a building is purchased at a tax foreclosure sale or a trustee's foreclosure sale under a lien superior to the tenant's lease and the tenant timely pays rent and is not otherwise in default under the tenant's lease after foreclosure, the purchaser must give a residential tenant of the building at least 30 days' written notice to vacate if the purchaser chooses not to continue the lease. The tenant is considered to timely pay the rent under this subsection if, during the month of the foreclosure sale, the tenant pays the rent for that month to the landlord before receiving any notice that a foreclosure sale is scheduled during the month or pays the rent for that month to the foreclosing lienholder or the purchaser at foreclosure not later than the fifth day after the date of receipt of a written notice of the name and address of the purchaser that requests payment. Before a foreclosure sale,

a foreclosing lienholder may give written notice to a tenant stating that a foreclosure notice has been given to the landlord or owner of the property and specifying the date of the foreclosure.

(c) If the occupant is a tenant of a person who acquired possession by forcible entry, the landlord must give the person at least three days' written notice to vacate before the landlord files a forcible detainer suit.

(d) In all situations in which the entry by the occupant was a forcible entry under Section 24.001, the person entitled to possession must give the occupant oral or written notice to vacate before the landlord files a forcible entry and detainer suit. The notice to vacate under this subsection may be to vacate immediately or by a specified deadline.

**TEX. R. CIV. P. 740. Complainant May Have Possession.**

The party aggrieved may, at the time of filing his complaint, or thereafter prior to final judgment in the justice court, execute and file a possession bond to be approved by the justice in such amount as the justice may fix as the probable amount of costs of suit and damages which may result to defendant in the event that the suit has been improperly instituted, and conditioned that the plaintiff will pay defendant all such costs and damages as shall be adjudged against plaintiff.

The defendant shall be notified by the justice court that plaintiff has filed a possession bond. Such notice shall be served in the same manner as service of citation and shall inform the defendant of all of the following rules and procedures:

(a) Defendant may remain in possession if defendant executes and files a counterbond prior to the expiration of six days from the

date defendant is served with notice of the filing of plaintiff's bond. Said counterbond shall be approved by the justice and shall be in such amount as the justice may fix as the probable amount of costs of suit and damages which may result to plaintiff in the event possession has been improperly withheld by defendant;

(b) Defendant is entitled to demand and he shall be granted a trial to be held prior to the expiration of six days from the date defendant is served with notice of the filing of plaintiff's possession bond;

(c) If defendant does not file a counterbond and if defendant does not demand that trial be held prior to the expiration of said six-day period, the constable of the precinct or the sheriff of the county where the property is situated, shall place the plaintiff in possession of the property promptly after the expiration of six days from the date defendant is served with notice of the filing of plaintiff's possession bond; and

(d) If, in lieu of a counterbond, defendant demands trial within said six-day period, and if the justice of the peace rules after trial that plaintiff is entitled to possession of the property, the constable or sheriff shall place the plaintiff in possession of the property five days after such determination by the justice of the peace.

**TEX. R. CIV. P. 738. May Sue for Rent.**

A suit for rent may be joined with an action of forcible entry and detainer, wherever the suit for rent is within the jurisdiction of the justice court. In such case the court in rendering judgment in the action of forcible entry and detainer, may at the same time render judgment for any rent due the landlord by the renter; provided the amount thereof is within the jurisdiction of the justice court.

**TEX. R. CIV. P. 743. Docketed.**

The cause shall be docketed and tried as other cases. If the defendant shall fail to enter an appearance upon the docket in the justice court or file answer before the case is called for trial, the allegations of the complaint may be taken as admitted and judgment by default entered accordingly. The justice shall have authority to issue subpoenas for witnesses to enforce their attendance, and to punish for contempt.

**TEX. R. CIV. P. 523. District Court Rules Govern.**

All rules governing the district and county courts shall also govern the justice courts, insofar as they can be applied, except where otherwise specifically provided by law or these rules.

**Tex. R. Civ. P. 747a. Representation by Agents.**

In forcible entry and detainer cases for non-payment of rent or holding over beyond the rental term, the parties may represent themselves or be represented by their authorized agents in justice court.

**TEX. PROP. CODE § 24.011. Nonlawyer Representation.**

In eviction suits in justice court for nonpayment of rent or holding over beyond a rental term, the parties may represent themselves or be represented by their authorized agents, who need not be attorneys. In any eviction suit in justice court, an authorized agent requesting or obtaining a default judgment need not be an attorney.

**TEX. R. CIV. P. 744. Demanding Jury.**

Any party shall have the right of trial by jury, by making a request to the court on or before five days from the date the defendant is served with citation, and by paying a jury fee of five dollars. upon such request, a jury shall be summoned as in other cases in justice court.



## **APPENDIX B**

### **TEX. R. CIV. P. 610. Application for Distress Warrant and Order.**

Either at the commencement of a suit or at any time during its progress the plaintiff may file an application for the issuance of a distress warrant with the justice of the peace. Such application may be supported by affidavits of the plaintiff, his agent, his attorney, or other persons having knowledge of relevant facts, but shall include a statement that the amount sued for is rent, or advances described by statute, or shall produce a writing signed by the tenant to that effect, and shall further swear that such warrant is not sued out for the purpose of vexing and harassing the defendant. The application shall comply with all statutory requirements and shall state the grounds for issuing the warrant and the specific facts relied upon by the plaintiff to warrant the required findings by the justice of the peace. The warrant shall not be quashed because two or more grounds are stated conjunctively or disjunctively. The application and any affidavits shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence provided that facts may be stated based upon information and belief if the grounds of such belief are specifically stated.

No warrant shall issue before final judgment except on written order of the justice of the peace after a hearing, which may be ex parte. Such warrant shall be made returnable to a court having jurisdiction of the amount in controversy. The justice of the peace in his order granting the application shall make specific findings of fact to support the statutory grounds found to exist, and shall specify the maximum value of property that may be seized, and the amount of bond required of plaintiff, and, further shall

command that property be kept safe and preserved subject to further orders of the court having jurisdiction. Such bond shall be in an amount which, in the opinion of the court, shall adequately compensate defendant in the event plaintiff fails to prosecute his suit to effect, and pay all damages and costs as shall be adjudged against him for wrongfully suing out the warrant. The justice of the peace shall further find in his order the amount of bond required to replevy, which, unless the defendant chooses to exercise his option as provided in Rule 614, shall be the amount of plaintiff's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court. The order may direct the issuance of several warrants at the same time, or in succession, to be sent to different counties.

### **TEX. R. CIV. P. 611. Bond for Distress Warrant.**

No distress warrant shall issue before final judgment until the party applying therefor has filed with the justice of the peace authorized to issue such warrant a bond payable to the defendant in an amount approved by the justice of the peace, with sufficient surety or sureties as provided by statute, conditioned that the plaintiff will prosecute his suit to effect and pay all damages and costs as may be adjudged against him for wrongfully suing out such warrant.

After notice to the opposite party, either before or after the issuance of the warrant, the defendant or plaintiff may file a motion to increase or reduce the amount of such bond, or to question the sufficiency of the sureties thereon, in a court having jurisdiction of the subject matter. Upon hearing, the court shall enter its order with respect to such bond and sufficiency of the sureties.

**TEX. R. CIV. P. 612. Requisites for Warrant.**

A distress warrant shall be directed to the sheriff or any constable within the State of Texas. It shall command him to attach and hold, unless replevied, subject to the further orders of the court having jurisdiction, so much of the property of the defendant, not exempt by statute, of reasonable value in approximately the amount fixed by the justice of the peace, as shall be found within his county.

**TEX. R. CIV. P. 613. Service of Warrant on Defendant.**

The defendant shall be served in any manner prescribed for service of citation, or as provided in Rule 21a, with a copy of the distress warrant, the application, accompanying affidavits, and orders of the justice of the peace as soon as practicable following the levy of the warrant. There shall be prominently displayed on the face of the copy of the warrant served on the defendant, in 10-point type and in a manner calculated to advise a reasonably attentive person of its contents, the following:

To \_\_\_\_\_, Defendant:  
You are hereby notified that certain properties alleged to be owned by you have been seized. If you claim any rights in such property, you are advised:

“YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WARRANT.”