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IF YOU CAN'T SELL IT, LEASE IT

11 TIPS REALTORS® NEED TO KNOW ABOUT RESIDENTIAL LEASING

"If you can't sell it, lease it" has become an increasingly common refrain among sellers looking for exit strategies on their houses other than to give them back to the bank. As a result, many listing agents who never before focused on leasing are scrambling to learn how to navigate what for many of them is a whole new world of real estate. To avoid these newcomers to leasing making some of the same mistakes that others before them have made as they began to handle residential leasing transactions, this article will provide some tips on how to avoid problems in this area.

TIP #1. GET THE OWNER TO SIGN A LEASE LISTING AGREEMENT.

BRRETA requires that all brokerage engagement agreements be in writing. Representing an owner in leasing his or her own property is included in the type of agreement that must be in writing. Entering into a lease listing agreement allows the REALTOR® to protect his or her commission rights and clearly spell out what the REALTOR® will do to earn his or her commission. This later point is important because the line between where leasing ends and property management begins is not always clear in the minds of property owners.

TIP #2. CONFIRM THAT THE DWELLING CAN BE LEASED.

In many condominiums and communities with homeowners associations, leasing is often restricted (and in some cases prohibited) in the covenants binding the community. Therefore, one of the first steps owners wishing to lease should take is to confirm that they have the right to lease their dwellings. Even where leasing is permitted, owners desiring to lease their dwellings in these types of communities must often follow an application procedure to obtain a leasing permit or some other type of written permission to lease from the community association. These procedures should be reviewed and followed.

Taking the risk of leasing in violation of a community's covenants is rarely a good idea. The right of community associations to restrict leasing has been upheld by our Georgia courts. Many community associations enforce their leasing restrictions aggressively either out of preference or to help ensure that buyers can obtain mortgage financing when they purchase a dwelling in the community.

TIP #3. ALWAYS RECOMMEND THAT PROSPECTIVE TENANTS BE SCREENED THROUGH CREDIT, CRIMINAL BACKGROUND AND PRIOR LANDLORD REFERENCE CHECKS.

Just like you cannot judge a book by its cover, the same is true with people. The only way to truly know a person's character is to investigate it through credit, criminal background and prior landlord reference checks. In the leasing business, it is much easier to keep a problem tenant out of a dwelling on the front end than to get them out once they have moved into a community.

Don't assume that the telephone numbers of previous landlords provided by the tenant are necessarily correct. Some unscrupulous tenants have been known to give out the phone numbers of friends who then masquerade as the manager of the

apartment where the tenant allegedly lived previously. Independently checking phone numbers of previous landlords can help prevent highly undesirable tenants from living in the properties of your clients.

TIP #4. REMIND THE LANDLORD THAT HE OR SHE MUST KEEP THE PREMISES IN REPAIR.

Georgia law very clearly provides that the landlord must repair the property. Specifically, state law provides as follows:

> The landlord must keep the premises in repair. He shall be liable for all substantial improvements placed upon the premises by his consent.

Property owners who are unfamiliar with this law are regularly surprised by it. Many feel that they should be free to negotiate business arrangements regarding repairs with a tenant. However, state law does not give them this luxury. Instead, the premise of state law is that landlords have an unfair bargaining position with tenants regarding repairs and tenants must, therefore, be protected against overreaching landlords.

Landlords have attempted to limit the effect of the provision by arguing that there is a difference between repairs and maintenance. They have argued that landlords can make tenants responsible for maintenance obligations even if they cannot make them responsible for repairs. So, for example, while fixing a broken light fixture would generally be thought of as a repair, changing a burned out light bulb would generally be considered maintenance. Maintenance is how many would describe such things as changing air filters, replacing the battery in a smoke alarm, cutting the grass, trimming bushes and unclogging a stopped up toilet. Of course, where the exact line is between maintenance and repair can quickly become an exercise in hair splitting (a favorite past time for lawyers). For example, if the backup in the toilet is caused by a partially blocked sewer line, is that still maintenance or does it now fall into the repair category? What if a repair is caused by the failure of a tenant to perform needed maintenance? What if the maintenance costs are very costly?

Some landlords have tried to limit their financial exposure for repairs by including provisions in their leases that if their maintenance personnel are called to a house or apartment and the tenant is either not home or no repairs are needed, the tenant pays a service charge for the trip. This type of provision will likely pass judicial scrutiny. Other landlords have purchased home warranties on their properties and have then shifted the cost of the deductible to the tenant. This approach is a riskier proposition, because if the landlord is responsible for paying for repairs, having the tenant pay for a deductible on repairs effectively means that the entire cost of the repair is not being paid for by the landlord as required under state law.

TIP #5. MITIGATE RISKS WHENEVER POSSIBLE AND ENCOURAGE OTHERS TO DO THE SAME.

Landlords are responsible for damages arising from 1) defective construction and 2) the failure to keep the premises in repair. Interestingly, landlords are not responsible to third persons such as guests resulting from the negligent or illegal use of the premises by the tenant. So, for example, if a tenant slips and falls on a broken wooden stair tread,

the tenant would potentially have a claim against the landlord if the landlord was aware of the need for repair and did not make it. There are at least four good ways to protect against this risk.

The first way is to mitigate risk is to warn tenants in writing of potentially dangerous conditions on the property. So, for example, if the top rear step of a house ices during the winter months, warning the tenant in writing of this risk will make it harder for the tenant to sue if he or she later slips and falls on the step when it ices. This is because the landlord can argue, among other things, that the icing was a condition of which the landlord and tenant had equal knowledge. The GAR Owners' Property Disclosure Statement, GAR Form F49, for is a good place for landlords to make such disclosures.

The second way to mitigate risk is to affirmatively require the tenant to notify the landlord in writing when there is a need for repairs. If the tenant fails to follow a required notification procedure, the landlord can defend against a claim for damages on the grounds that the tenant's negligence in failing to report the need for repairs is what was the proximate cause of the injuries.

The third way to mitigate risk is to eliminate potentially dangerous conditions on the property to the extent possible. So, for example, if the light fixture on the landing leading to the basement is broken, it should be fixed before a tenant trips or falls because of the lack of light. If there is a railing on the stairs that is loose, tighten it. When a risk can be eliminated through an inexpensive repair, it is always better to make the repair than to try to control the risk through disclosure. In making a needed repair, the duty of the landlord is to use due care in making the repair to leave the repaired portion of the property free from defects. Therefore, temporary fixes should not be used if the repair can fail and result in injuries to a tenant or third person.

The fourth way to mitigate risk is to insure against it. Property owners should not assume that the insurance policy they purchased when they were living in the home will fully protect them when they have moved out and are now leasing the home. Not only should the landlord be encouraged to get special landlord insurance, the tenant should be encouraged to get renter's insurance as well. This latter insurance will protect against the loss of the tenant's personal property in the event of a burglary, fire or other calamity. Some landlords require tenants to obtain renter's insurance as a hedge against the tenant suing the landlord to recover uninsured damage.

Finally and most importantly, REALTORS® performing property management functions should obtain liability insurance to protect against claims that can be brought by both the tenant and the landlord. While most property management agreements require the property owner to indemnify and hold the property manager harmless from most claims, there are often exceptions to these indemnification obligations that can leave a property manager exposed to claims. In other cases, the landlord may not have either insurance or other money to fund an indemnification obligation.

TIP #6. ALWAYS GET A MOVE IN / MOVE OUT INSPECTION FORM, GAR FORM F43, SIGNED BY THE TENANT.

Georgia law requires landlords who are either not natural persons or own more than 10 rental units (either themselves or collectively with a spouse or minor children) to

present their tenants with a comprehensive list of any existing damages to the premises prior to tendering a security deposit. The landlord and tenant are each supposed to sign the list prior to the tenant taking occupancy.

Within 3 days after the date of the termination of occupancy, Georgia law requires these larger or corporate landlords and their tenants to inspect the premises and compile a comprehensive list of any damages done to the premises. Any charge against the security deposit and the estimated value of such charge is required to be based upon the list. If the tenant refuses to sign the list of damage on the front end of the transaction, the tenant must state in writing the items to which the tenant dissents and sign the statement. If the tenant refuses to sign the list on the back end of the transaction, the same rule applies. If the tenant terminates occupancy without telling the landlord, the landlord should make a final inspection within a reasonable time after discovering the termination of occupancy.

TIP #7. RETURN EARNEST MONEY TO WHICH THE TENANT IS ENTITLED WITHIN 30 DAYS.

As a general rule, within one month after the termination of the residential lease or the surrender and acceptance of the premises (whichever occurs last), landlords who are either not natural persons or own more than 10 rental units are obligated to return that portion of the security deposit belonging to the tenant. If any portion of the security deposit is withheld to cover damages to the property, the damages must be listed on the Move In / Move Out Inspection Form, GAR Form F43, or they cannot be deducted from the security deposit. These larger or corporate landlords who do not timely return a security deposit within 30 days are potentially liable to the tenant for three times the amount of the security deposit improperly withheld plus reasonable attorney's fees.

TIP #8. DON'T CUT OFF LANDLORD PROVIDED UTILITIES.

Whenever possible, landlords try to have the tenant pay utilities separately from and in addition to the rent. In such cases, the utility bill should be in the name of and paid for by the tenant. However, if landlords are providing heat, light and water these things may not be cut off until after the final disposition of any dispossessory proceeding by the landlord against the tenant. The fine for breaking this law is $500.

TIP #9. KNOW HOW MUCH NOTICE NEEDS TO BE GIVEN TO TERMINATE THE LEASE.

One would think that this would be among the easiest things for the parties to a lease to determine. However, more disputes arise over the termination of leases than any other. There are several reasons for this.

First, parties often get confused over how much notice is needed to terminate leases when there is no written lease or the lease does not state an expiration date. Georgia recognizes two types of tenancies, a "tenancy at sufferance" and a "tenancy at will" in these situations. Let's look at the definitions of these terms to understand the differences here. A tenancy at sufferance is where the tenant is occupying the dwelling but has no legal right to do so. A tenant holding over illegally after the end of the lease term would generally be considered a tenancy at sufferance. No advance notice to the tenant needs to be given to terminate a tenancy at sufferance.

A tenancy at will is created where no time is specified in the lease agreement for the termination of the lease. So, for example, let's say that a landlord enters into a verbal lease with a tenant to lease a dwelling for $600 per month. If the lease contains no end to the lease term, it would be considered a tenancy at will. Under Georgia law, a landlord must give a tenant 60 days notice of the landlord's decision to terminate the lease. The tenant, however, is only required to give the landlord 30 days notice of the tenant's decision to terminate the lease.

Let's look at another example to better understand a tenancy at will. A landlord writes into the lease that the tenant may continue to reside in the house until it goes under contract to be sold at which time the landlord may give the tenant 30 days notice to terminate. Is this a lease with a definite end of the term or a tenancy at will? The Georgia Court of Appeals found that a lease term tied to a contingency (such as the sale of property) was not a definite ending term and ruled that it was thus a tenancy at will requiring 60 days prior notice to terminate.

What if a lease includes a two year renewal term unless either party terminates upon 30 days notice to the other? This would not be considered a tenancy at will since the lease contains a definite end to the term. As such, the lease may be terminated upon the 30 days notice in accordance with the terms of the lease.

The second reason that lease disputes often arise over the termination provision is that the plans of tenants and landlords change causing them to want to terminate on a date other than at the end of the lease. There is nothing in Georgia law which requires a landlord to agree to an early termination provision in the lease or to agree to terminate the lease early upon the request of the tenant. However, state and federal law does give active duty military personnel the right to terminate early if they receive orders requiring them to deploy to a location more than 35 miles away or to move onto a base. In such instances, the tenant's obligation to pay rent is 30 days rent from the first date on which the next rental payment is due. So, for example, let's say a serviceman is deployed to Afghanistan on December 15, 2012. If the rent was due on the first of the month, the most rent the landlord could require the solider to pay is through December 30, 2012.

While a landlord is not required to agree to terminate a lease early, a landlord is required to make reasonable efforts to limit or mitigate his or her damages resulting from a breach of the lease. So for example, let's say that a tenant signs a 12 month lease and is transferred to another city almost immediately thereafter. If the tenant wrongfully terminates the lease and stops paying rent, the landlord must make reasonable effort to attempt to lease the dwelling to a second tenant to limit or mitigate the damages of the first tenant.

TIP #10. NOT ALL LEASE FORMS ARE THE SAME.

There are many lease forms available for use in residential leasing transactions. Do not assume that all leases are about the same. Since landlord tenant laws vary so much from state to state, it is extremely important to use a lease form like the GAR Lease for Residential Property ("GAR Lease"), GAR Form F40, that was specifically written to comply with Georgia law. Most leases are also written to protect the interests of the landlord. The GAR Lease is no different in this regard, although it is also to protect the REALTOR®.

The GAR Lease also contains provisions, which if not included in the lease, could create serious problems for the landlord and REALTOR®. For example, the GAR Lease gives the landlord the right to enter the dwelling for inspection and maintenance purposes. Such rights of entry normally do not exist unless they are provided for in the lease. Similarly, the owner has certain rights to put up "For Rent" and "For Sale" signs and to show the property to future prospective buyers and tenants during the lease term. This right would also not exist but for the fact that there is a provision in the lease giving this right to the owner. The GAR Lease also requires tenants to report needed repairs in writing to help minimize the landlord's exposure to claims. The GAR Lease also contains required state law disclosures, including whether any portion of the dwelling has sustained damage due to flooding at least 3 times during the last 5 years.

TIP #11. REMIND THE LANDLORD WHEN SECURITY DEPOSITS MUST BE PUT IN ESCROW.

If a real estate broker is holding security deposits, they must be placed in a trust or escrow account registered with the Georgia Real Estate Commission. Such escrow accounts must be federally insured checking accounts unless otherwise agreed to in writing by the parties with an interest in the funds. In a leasing transaction, both the landlord and tenant would have an interest in the funds. If the security deposit is held by the property owner, it must be placed in an escrow account if: 1) the lease agreement requires the security deposit to be placed in an escrow account; or 2) the landlord is not a natural person; or 3) the landlord either individually or in combination with his or her spouse and minor children owns more than 10 rental units. So for example, if an investor owns two (2) single-family homes for rent and the legal title to the homes is put in the name of a limited liability company, the investor must place the security deposits in an escrow account.

Landlord tenant law also requires that all escrow accounts in which security deposits are placed be "established only for that purpose." This requirement applies to brokers, as well as to landlords who are otherwise required to deposit security deposits in an escrow account. While there are no reported appellate cases interpreting this section of the law, it has generally been interpreted to mean that the account must be set up only for security deposits and for no other purpose. Therefore, a real estate broker would want all security deposits in one trust account designated for this and not use this escrow account for any other purpose.

Landlord tenant law also requires that the tenant be informed in writing as to the location of the escrow account (unless security deposits are required to be placed in escrow). This would require disclosure of the name and lending institution in which the deposits are held (but not the number of the account).

CONCLUSION

While the landlord tenant area includes some traps for the unwary, many REALTORS® are earning commission dollars in leasing real property. Look for more REALTORS® to be doing work in this area.

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