



LANDLORDS, TENANTS AND A FEW TOTAL STRANGERS (2)

By W. Christopher Barrier

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.

Years ago, I had a client who was buying real estate notes and mortgages at a discount from various extenders of credit. Almost all represented home improvement loans, and most of the purchases were from the home improvement companies themselves. But, one batch of loans in particular were being sold by a small credit life insurance company in a small town in northeast Arkansas, to improve its liquidity.

As you might imagine, the margins were thin and the purchasing client needed to keep his expenses down, including legal fees and costs for review and repair of the loan files. It was cheaper to fly me to the small town and back in a single day than it would have been for me to drive up, spend the night, drive back and so forth.

Mortgage banking meets micro-lending...

I was flown in a tiny two-seater by a young pilot from LRAFB on his day off. We basically followed the interstate at what seemed an altitude of a few hundred feet and a speed not much greater than the cars below. He pored over his checklist, before take off and along the way, which made me think he had never flown this plane before, an unsettling thought.

But, no, he had flown it over a dozen times, the protocol being to treat every flight in every plane as his first one, which was very reassuring, even when we landed on a dewy grass landing field flanked by an elderly faded red Ford pickup owned by a plumber who emblazoned it by hand with a commode and his motto "If It Don't Flush, Call Us!"

I've got a little list, yes...

Many legal tasks, such as mortgage purchases and evictions, benefit from the use of checklists, by lawyers and also their clients, first to clarify their goals as to what they want to accomplish. Does the landlord want to get the tenant out and cancel the lease, maybe with some view to collecting back rent, but mainly to get in a position to install a new tenant?

Or does he want to keep the lease in place, holding on to the right to re-let the property on behalf of the old tenant and collect any deficiency from the old tenant? Next on the checklist should be a review of *the lease itself* to make sure the breach claimed and the remedies sought are actually allowed by the lease.

One lease, two claims...

If an unlawful detainer action is called for (usually because the transgression is a simple failure to pay rent), next on the checklist is the traditional three-day notice, with a sub-item for making sure the tenant actually was served. Remember that there are really two claims in any such action, one for possession of the property and the other for breach of contract and, hence, damages.

You have to prove by affidavit that you, the landlord (perhaps represented by a property manager with written authority), have a right to the property, which may relate to the first items, goals and remedies. For example, the landlord may actually be a tenant and the tenant a sublessee. Several years after my plane ride, I had a client who leased the building now occupied by the Weekend Theatre and subleased it (unbeknownst to me) to Robert "Say" McIntosh for a restaurant. Not surprisingly, "Say" got behind on his rent and maybe the utilities as well.

Those who help themselves...

We pursued his breach through to a writ of possession and showed up with a deputy sheriff at the appointed hour. "Say" was late and the doors were locked, but they had been installed with the hinges on the outside, enabling me to flip the hinge shafts with a pocket knife and take off the doors. The deputy got nervous when "Say" and his lawyer appeared, but his lawyer told him we were within our rights, since we had meticulously followed *our* checklist.

Again, we had to establish my client's current right to possession, a material *breach* (not just a day late or a dollar short) by "Say", *service* of the requisite notices and all of the statutory elements---you can't take anything on your checklist for granted and you have to think the process through before you start, including surprises.

Ain't the landlord just all right?

"Say" had furniture and also equipment, including a lemonade machine. My client's homemade lease gave him no lien on contents (a checklist item), and we did not know who actually owned the furnishings. The statute clarifying landlord's rights in such instances had not been enacted. Fortunately, "Say" had arrived in a pickup truck (without a motto on the door) and hauled it all away, but you have to be ready for quandries such as that.

As for remedies, my client was clear that he just wanted the property back (since he was current on his rent) with no hope of a collectable deficiency. He did understand that, in future transactions, he needed detailed checklists, both before and after possible defaults. He did not, however, think he needed to be reminded, by checklist or otherwise, not to do any more business with Mr. McIntosh, except maybe an occasional sweet potato pie purchase.

CHRIS BARRIER practices real estate law with the Little Rock office of Mitchell Williams.

