

Tenant Remedies for Landlord Defaults

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**Landlord/Tenant Committee
Real Property, Probate & Trust Law Section
*The Florida Bar***

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Tenant Remedies for Landlord Defaults

I. Nature of a Commercial Lease

- Lease is a conveyance for a term of years
 - Caveat Emptor
 - No implied warranties or covenants
 - For maintenance
 - For fitness for a particular purpose
- Rule of Independent Covenants
 - Landlord's breach of its repair covenant does not alter Tenant's covenant to pay rent
- Lease is a contract
 - Erosion of caveat emptor
 - Implied covenants
 - Contract remedies, including mitigation of damages

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II. Remedies at Law

Remedy	Trigger
Contract Damages	Tenant may recover customary contract damages: • Restatement (Second) of Property, Landlord and Tenant, §10.2: • General Rule: Diminution in FMV (or FMV if Tenant terminates); • Lost profits. <u>Sostchin v. Doll Enterprises, Inc.</u>, 847 So. 2d 1123 (Fla. 3d DCA 2003); and • Loss of expenditures made before Landlord's breach.
Punitive Damages	Generally unavailable in a contract action unless Landlord commits an act constituting an independent and intentional, malicious tort. <u>Lewis v. Guthartz</u>, 428 So. 2d 222 (Fla. 1983).
Right to Withhold Rent	83.201 FS: Permits withholding where Landlord's breach of a repair covenant renders the premises untenantable.
Mitigation. Florida law permits courts to reduce a Tenant's damages by an amount equal to the costs that Tenant could have avoided if it had taken reasonable steps to mitigate its damages. <u>Brewer v. Northgate of Orlando, Inc.</u>, 143 So. 2d 358 (Fla 2d DCA 1962).	

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III. Equitable Remedies

Remedy	Trigger
Termination: • Rescission	Landlord defaults prior to commencement of lease term. Florida law requires that parties must be able to be restored to original positions. <u>Yanks v. Truly Nolen, Inc.</u> , 341 So. 2d 829 (Fla. 3d DCA 1977).
• Constructive Eviction	Landlord commits act of constructive eviction and Tenant abandons. <u>Richards v. Dodge</u> , 150 So. 2d 477 (Fla. 2d DCA 1963).
Injunctive Relief/Specific Performance	These remedies are available if: (i) irreparable harm will result from denial of the requested relief and (ii) there is no adequate remedy at law. If a party seeking this relief has a right to adequate damages, then the court lacks jurisdiction to provide such equitable remedy.
Specific Performance	Landlord fails to perform an obligation and Tenant lacks an adequate remedy at law (which may be difficult to prove). However, Florida courts have denied granting specific performance in leases out of concerns about supervision. <u>Mayor's Jewelers, Inc. v. State of Cal. Pub. Employees' Retirement Sys.</u> , 685 So.2d 904 (Fla. 4th DCA 1996).
Declaratory Judgment	Landlord and Tenant cannot agree on meaning of lease provision and require court adjudication. <u>Kelner v. Woody</u> , 399 So. 2d 35 (Fla. 3d DCA 1981).

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IV. Self-Help and Offset

* Tenants have the right to make necessary repairs and deduct the expense thereof from rent. Maser v. London Operating Co., 145 So. 79 (Fla. 1932).

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V. Common Lease Limitations on Tenant's Remedies

- **Waivers.** Landlords try to get Tenants to waive their rights to any or all of the following:
 - Claims for Consequential Damages
 - Claims for Damage to Property and Person (e.g., the burst pipe waiver)
 - Subrogation
 - Right of Set-Off
 - Claims for Interruption of Services
 - Recovery for broad claims (e.g., injury from Landlord's negligence)
 - Claims for Breach of Covenant of Quiet Enjoyment (arising from 3rd party action - the "by, thru and under" limitation)
 - Claims of Constructive Eviction (may be deemed to violate public policy)
 - Jury Trial
- Florida courts generally enforce exculpatory clauses in leases.
- **Force Majeure.** Landlords may also include robust Force Majeure provisions that may encompass events that ordinarily would be considered Landlord defaults.

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VI. Common Lease Limitations on Tenant's Remedies

- Acceptance of Premises. Landlords may require Tenants to accept premises in "as-is, where-is" condition as it pertains to physical and environmental condition, compliance with laws, and zoning and permitting.
- Landlord Exculpation. While most leases include some form of Landlord exculpation, some leases go beyond custom and further limit "Landlord's interest" to landlord's equity in the building (often further reduced by a phantom mortgage).
- Doctrine of Independent Covenants. Landlord's covenants (of maintenance, repair, etc.) are independent from the Tenant's covenant to pay rent; a breach of the former does not excuse a breach of the latter.
- Notice and Cure Periods. Landlords like expansive and open ended notice and cure periods, with additional periods for its lender.

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VII. Checklist for Tenant's Counsel

B. Strengthen Tenant's Lease Position

- ☐ Provide an express right of self-help and offset for Landlord's default or breach of representation.
- ☐ Provide an express right for Tenant to terminate after Landlord's default and failure to timely cure.
- ☐ Make lease covenants dependent.
- ☐ Reserve all legal and equitable rights and remedies.

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- ☐ Require Subordination and Non-Disturbance Agreement (SNDA) from Lender.
- ☐ Require Tenant Improvement Allowance (TIA) be escrowed or otherwise secured (letter-of-credit, set-aside letter, parent guaranty).
- ☐ Carefully review all waivers.
- ☐ Address Landlord default specifically – e.g., notice/cure provisions, reserved rights of termination, specific remedies.
- ☐ Beware of boilerplate!