

What?! Landlord Loses \$2.5 million in Rent from Defaulting Tenant

By Roy Niedermayer

Your tenant is delinquent in rent payments and in default, possibly due to financial trouble. As landlord, you want to declare him in default, terminate the lease and seek payment of accrued past and recovery of future rent for the remainder of the term. Your lease remedies for default terms provide for a cumulative and disjunctive shopping list of lessor's rights allowing recovery of the premises by re-entry, re-letting, termination of the defaulting lessee's lease AND recovery of past due rent and future rent for the balance of the lease term. There is no lease requirement of making any either-or choice among remedies. You can exercise them all. So, you terminate the lease and commence collection of past and future rent only to learn your termination notice may now bar recovery of rent for the balance of what would have been the remaining term.

What happened? Traditionally, under many states' common law, landlords have a strict either-or choice: either terminate the lease and recover possession for re-letting OR re-enter and re-let without termination but recover past and future rent. But the default terms of many leases may simply innumerate list a series of rights without a disjunctive "or" between plus a following general catch-all term noting the listed specific rights are "in addition" to statutory or common law ("other") rights.

Recently, the *United States Fourth Circuit Court of Appeals in Elderberry of Weber City, LLC v. Living Centers-Southeast, Incorporated, et al.*, No. 13-276 decided July 21, 2015 barred an out-of-luck landlord from recovery of five years of future rent where it had resumed possession and terminated the lease, although the express lease default rights did not require any alternative election and there was an a cumulative "savings" provision.

What went wrong? Without the conjunction "and" between each listed right, the provisions for both recovery of possession by termination and recovery of future rent were in conflict with each other, and contrary to existing Virginia law. And there was no other express language making all these listed remedies the exclusive options and available to the landlord at the same time, thereby eliminating the common law either-or election requirement of state law.

What is to be done? Better lease draftsmanship in light of your state's statutory and common law is a start. Simply providing the cumulative nature of each right may not be enough. Clearer contract language, use of the conjunctive "and" between the separate listing the rights, and an express waiver by the tenant of any contradictory statutory common law rights will certainly help avoid the loss of landlord's right to rent accruing after termination of the lease of a defaulting tenants lease.