

CAN I GET MY ATTORNEYS' FEES?

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Lawyers can be expensive, or so clients claim! Unfortunately, a landlord facing a difficult tenant who is not paying rent or who is otherwise breaching the lease will often be forced into legal proceedings. This is particularly true in New Jersey, a notoriously tenant-friendly state where eviction and collection actions must be filed separately and a non-individual landlord (i.e. an LLC or corporation) must be represented by a lawyer. Landlords, therefore, typically work hard to ensure that they can recover their legal fees from their tenants.

THE AMERICAN RULE

In order to preserve the right to recover legal fees from a defaulting tenant, a landlord must include an "attorneys' fee" provision in the lease. This is because in America, unlike England, litigants are responsible for their own legal fees - regardless of who prevails in court. Thus, a landlord must negotiate the contractual right to recover attorneys' fees from its tenant.

THE LEASE PROVISIONS

A typical "attorneys' fee" clause in a lease will allow a landlord to recover its "actual attorneys' fees" resulting from any "action" or "other proceeding" against the tenant in connection with the lease or leased premises, including evictions and collections. In most cases, the Landlord will only be able to recover its fees if it "prevails" against the Tenant. There is extensive case law regarding what it means to "prevail" in a legal proceeding that settles or is otherwise resolved without a judgment, although sometimes landlords and tenants negotiate their own definition.

Some attorneys' fee provisions will allow the landlord to seek reimbursement for legal fees incurred before or outside of litigation. This allows the landlord to recover the money it spends on a lawyer to write a default letter demanding a cure, usually prompt payment of rent. Additionally, landlords are sometimes able to negotiate a broader right to be indemnified from any legal fees resulting from the tenant's conduct. This broader right would protect the landlord if it is dragged into an environmental or personal injury dispute as a result of the tenant's conduct, for example.

THE IMPORTANCE OF "ADDITIONAL RENT"

Regardless of the scope of an attorneys' fee clause, it is important that attorneys' fees be defined as "additional rent" under the lease. This will allow the landlord to evict a tenant who fails to

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reimburse it for its legal fees - even if the tenant has otherwise cured all of the defaults under the lease. Defining attorneys' fees as "additional rent", therefore, increases the landlords' chance of recovery while the tenant is in possession of the premises and reduces the likelihood that the tenant will play "legal" games with the landlord.

RECIPROCAL PROVISIONS

In most cases, a tenant will not object to the inclusion of a reasonably drafted attorneys' fee clause in the lease. The tenant, however, may demand that the provision be mutual. In other words, the tenant will also seek the right to recover attorneys' fees if it prevails in an action or other proceeding against the landlord. (Notably, as of February 1, 2014, all attorneys' fee clauses in residential leases must give tenants the same right of recovery that the landlord has.)

CONCLUSION

Including well-drafted attorneys' fees clauses in leases is essential for protecting the rights of landlords. Without such provisions, a landlord cannot recover its legal costs from a defaulting tenant. Moreover, the very presence of an attorneys' fee clause may make a tenant think twice before pushing the landlord into court.

For more information, contact:



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