



**What is the difference between terminating a lease and terminating the tenant's right of possession?**

*By John Wait, General Counsel*

**QUESTION:** One of my landlords was looking at our standard form lease, Form 410-T, because their tenant has inconsistently been paying rent. When they looked at their options for the tenant's breach, they saw that they can either terminate the lease or terminate the tenant's right of possession. They asked me what the difference is between the two options and which one might be best. Can you help me explain it to them?

**ANSWER:** A landlord actually has three options when the tenant breaches Form 410-T: (1) terminate the tenant's right of possession; (2) terminate the lease; or (3) do nothing. For obvious reasons, the third option is not one that is often chosen. So, let's examine the first two.

A bankruptcy court in Florida has explained the main difference as follows:

“By affirmatively terminating the lease and retaking possession of the premises for its own use, the landlord has cut off the tenant's obligation to pay any future rent under the lease. If the landlord simply takes possession of the premises on account of the tenant, the tenant's obligation to pay the rent due for the duration of the lease term remains. That is the crucial distinction between the first two remedies. Termination of the lease is what cuts off the tenant's obligation to pay future rent.”

*In re 2408 W. Kennedy, LLC*, 512 B.R. 708, 713 (Bankr. M.D. Fla. 2014).

Form 410-T explains these two options more broadly, but the main premise is similar:

“g. *Termination of Lease:* In the event Landlord terminates this Contract, all further rights and duties hereunder shall terminate and Landlord shall be entitled to collect from Tenant all accrued but unpaid rents and any damages resulting from Tenant's breach, including but not limited to damages for

Tenant's continued occupancy of the Premises following termination.

*h. Termination of Possession:* In the event Landlord terminates Tenant's right of possession without terminating this Contract, Tenant shall remain liable for the full performance of all the covenants hereof, and Landlord shall use reasonable efforts to re-let the Premises on Tenant's behalf. Any such rentals reserved from such re-letting shall be applied first to the costs of re-letting the Premises and then to the rentals due hereunder. In the event the rentals from such re-letting are insufficient to pay the rentals due hereunder in full, Tenant shall be liable to Landlord for any deficiency. In the event Landlord institutes a legal action against Tenant to enforce the lease or to recover any sums due hereunder, Tenant agrees to pay Landlord reasonable attorney's fees in addition to all other damages."

Put another way, terminating the lease means that the lease no longer applies to the landlord-tenant relationship unless the lease states that an obligation survives termination. In Form 410-T, paragraph 16 outlines certain obligations that survive termination. Anything outside of that paragraph, like the landlord's right to access and the tenant's obligations in paragraph 5, would likely be terminated upon termination of the lease, although the facts of each case would need to be evaluated individually.

Given the gravity of terminating the lease, it is best for the landlord to terminate possession in most cases where Form 410-T is being used. However, in cases where the tenant may be considering bankruptcy or if a lease other than Form 410-T is being used and permits a tenant to cure a default, terminating the lease may be the best option. In the latter two scenarios, terminating the lease may help avoid litigation and delays in regaining possession.

As always, if there is any question as to which option is better, be sure to advise the landlord to seek legal counsel.

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