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A Landlord's Guide to Avoiding Rental Losses

by Anthony L. Ranken

***IMPORTANT WARNING:** Due to the pandemic, the State of Hawaii is operating under a state of emergency that limits a landlord's right to evict tenants. Some evictions are still legal, but while the state of emergency is in effect landlords are strongly advised to consult with an attorney and have any potential eviction notices reviewed for legality before sending them to tenants. There are heavy penalties for invalid notices. The state of emergency remains in effect as of the end of 2020 and probably will continue for the first several months of 2021. Please feel free to call us at 244-7011 for the current status of the emergency order and its effect on evictions.*

Hawaii's Landlord-Tenant Code gives tenants many rights, and there are several hoops that a property owner must jump through in order to evict a tenant who's not paying rent. But if you act quickly when the problem first arises, it is possible to avoid losing even a dollar in rent.

The first key to avoiding losses is to act immediately, the first day after your tenant gets behind in the rent. A lease will normally say that a late fee applies only if the rent is 3 or 5 days late, but that's not a grace period. So if your tenant hasn't paid by the morning of the second day of the month, immediately give them a "Five-Day Notice to Pay Rent or Quit." (and maybe back it up with an e-mail as proof). Our law firm will provide you with a sample "five-day notice" letter at no charge. The five-day notice tells the tenants how much they owe, and it requires them to either catch up on the rent within one week (five working days) or move out ("quit" the premises) by then.

We recommend contacting an attorney during the five-day period, so they can stand by and be ready to take action when the tenant misses the deadline. Under Hawaii

law, attorneys can't charge you until they actually work on the case, so you won't be incurring fees by taking this precaution.

If the tenant doesn't leave or pay rent after five days, don't delay – call your lawyer. If you then allow the tenant to catch up on rent or if they leave on their own before the court date, your attorney will only have invested a modicum of billed time – and it was probably the pressure of the filed complaint that caused the tenant to pay or leave. Whether they stay or go, you can require them to reimburse you your court costs in addition to the rent they owe.

When the five day notice expires, timing is crucial: the court date is always on a Monday, usually the second Monday after filing, so a complaint for summary possession filed on a Friday will probably be heard a week earlier than one filed the following Monday. Be sure to contact your lawyer on or before the fifth day. If that lawyer can't address the matter promptly, call another attorney.

On the “return date” (first court hearing), the judge will ask the tenant whether they agree that they are behind on rent. If they agree, the judge will issue a writ of possession effective that same week. If the tenant disputes the eviction, then the judge will require the tenant to make a deposit into the court’s Rental Trust Fund, in the amount of the disputed rent. The deadline for making that deposit will be later that same week (it’s currently being set for Wednesday at noon). If the tenant makes the deposit, he/she has the right to a trial and the money is released to the winner. If the tenant doesn't make the deposit, then on Wednesday afternoon you can submit your writ of possession for the judge’s signature.

As a landlord myself, I have found that the best time to negotiate with a tenant is when you have the writ of possession in hand! That writ of possession remains enforceable for six months from issuance. If the tenant knows that you can put them on the street literally any day you choose, then they will be highly motivated to find the rent money somehow. At that point you hold all the cards and you can afford to be generous if you like: If they are a good tenant in other respects, and you think that they can catch up in a reasonable time, you don't have to enforce the writ. You can accept a partial payment with a catch-up plan, and reserve the right to immediately evict them if they fail to comply with the plan. Put the catch-up plan in writing and have them sign it. It should state that the writ of possession will be executed without further notice if they miss any payment. You can incorporate your attorney fees and costs into the catch-up plan. If you do give them

time to catch up, enforce it strictly -- make sure they are actually catching up each month, not falling farther behind!

COLLECTING FROM A TENANT ONCE THEY MOVE OUT

If the tenant is employed, garnishing their wages is a relatively simple matter. After the eviction, you can apply to the court for a monetary judgment, and in most cases the judgment is granted based on your written application, without the need for a hearing. Once you have a judgment you can garnish the tenant's bank accounts as well as wages. It's a good idea to make a copy of their rent check when they move in or at some point later, so that you can easily identify their bank if you end up having to garnish them.

If the tenant is unemployed or self-employed, it's going to be very hard to collect a judgment: often I advise my clients to consider cutting their losses and not even spend the money to have me obtain a monetary judgment. The best time to think of this is before the tenant moves in: if they don't draw a paycheck then try to get a family member who does to co-sign the lease as a guarantor. That way you'll have someone to go after if the tenant defaults.

WORK-TRADE AGREEMENTS:

Tenants often claim deductions for work they allegedly did with your permission. Put in your lease that the tenant may deduct no money for repairs or work performed on the premises unless authorized in writing by Landlord. Establish a record of complying with that provision yourself. If you have a history of clearly documented and limited rent deductions, and a provision in your lease requiring it, then it is very unlikely a judge will give a tenant credit for a deduction that's not in writing. E-mail is fine for documenting such things; a signature is not required.

PERFORM AND DOCUMENT REPAIRS

Many times tenants will become disgruntled because the owner is not completing repairs in a timely fashion, and this can lead to non-payment of rent and possibly a court-ordered deduction from what the tenant owes. Under Hawaii law tenants do have the right to clean, safe, habitable premises with functioning utilities and appliances, and you may be penalized if you fall short in any respect. The best solution is to document by e-mail any oral or written notice that you've received from the tenant as to a problem, promptly get in touch with a repair person, and use e-mail to let the tenant know your progress in dealing with the issue.

Be sure to provide 48 hours' written notice anytime you need access for yourself or a repair person. I prefer e-mailed notices because they document the time and date sent, but be sure to confirm by text, phone, or voice mail message in case your tenants don't check their e-mail.

AVOIDING DISPUTES OVER THE SECURITY DEPOSIT

The Hawaii Landlord-Tenant Code contains a provision designed to minimize conflict over the landlord's right to withhold money from the security deposit.

Prior to the tenant moving in, you are required by law to do an inventory of the premises and "make a written record detailing the condition of the premises and any furnishings or appliances provided." Note any and all pre-existing damages, preferably room-by-room, or a statement that there are none. You and the tenant sign and date this paper and each get a copy. This requirement is for your protection: you can't get in trouble for failing to do the inventory, but absent an inventory the judge must presume the damages were there at the outset, and therefore will generally decide in the tenant's favor.

Guard against major damages during the tenancy by conducting periodic inspections of the premises. (Give 48 hours' written notice for each inspection.) If you find a problem for which your tenants are responsible, give them a week to fix it after which you will fix it yourself and bill them for it.

AT THE END OF THE LEASE: DON'T FORGET YOUR 14-DAY NOTICE!

When your tenant moves out, whether voluntarily or after being evicted, you are required to either refund their security deposit in full or give them a letter showing the deductions for past-due rent, cleaning, and repairs. Be as specific as possible, but if you don't have exact costs of repairs yet, then give your best estimate and just be sure to get the letter out within the 14 days. This is an absolute requirement of the law and if you're late the judge will order the entire deposit returned to the tenant, and possibly a substantial penalty as well! Ask for the tenant's forwarding address, but if you don't get it then just send the letter to the residence address of your rental unit; it's up to the tenant to arrange forwarding of their mail. Do send the tenant a hard copy, but if you have their e-mail address then by all means send them a copy by e-mail as well.

CAN YOU REALLY AVOID RENTAL LOSSES?

Yes you can. Of course it helps to select your tenants wisely: on your rental application, ask for their entire rental history and call their prior landlords, then go the extra mile and look online to see if they've ever been sued for rent or eviction. (Our staff will gladly show you how to access that information, again at no charge.) If you still end up with a deadbeat tenant, just follow the above timeline and you'll come out okay. Tenants think they can exploit the delays in the law to get a month or two of free rent, but that only works if an overly trusting landlord lets them make excuses and accepts delay.

Follow the steps in this guide diligently, and you'll have the last laugh when you keep your tenant's security deposit and it covers all the rent they didn't pay! You can be in court by around the 20th day of the month for which your tenants didn't pay rent. You'll either get your rent or have them out of the premises by the end of the month. As long as there are no major damages, the tenant's security deposit will cover that one month rent.

LISTEN TO THE BARD

William Shakespeare wrote: "Love all, Trust a Few, Do Wrong to None". Limit those you trust to your good friends and family, not your tenants. Even if your tenants are good people and mean it sincerely when they promise to pay you, they may simply not be able to pay. After all, the reason they are behind in rent is because they have too many competing demands on their limited resources. A car repair will probably take precedence over the rent check. It's okay to sympathize with your tenants and certainly you should treat them fairly, but promise yourself to take care of yourself first, by keeping the process moving forward and sticking strictly to your timeline. If you like your tenant, explain to them that you're willing to work with them and let them catch up the rent, but you need to move forward with the proceedings as a back-up. Get your writ of possession first, then negotiate!

If you have any questions please don't hesitate to call Napoleon Taylor or myself at 244-7011. And remember, you don't have to lose money on a deadbeat tenant, as long as you don't delay!