**Residential**

**Landlord-Tenant**

**Law**

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**Florida Judicial College**

**March, 2017**

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I. Introduction

The decision-making of county court judges handling residential landlord-tenant cases should be informed by an intimate familiarity with the requirements of the law, sensitivity toward the concerns of the litigants, and the desire to achieve just and lawful results in an efficient manner. These materials accompany a presentation intended to enhance the ability of the participants to achieve the fair and expeditious disposition of landlord-tenant cases, in accordance with the applicable law.

In order to promote these goals the county judge should make efforts to promptly review the landlord cases assigned to him or her. The tenant in an eviction case has only 5 days to answer and, in most cases, is required to deposit the accrued rent into the Clerk’s registry. The failure to do one or both of those things results in a default judgment of eviction in the vast majority of the cases.

Before entering a default judgment of eviction, it is incumbent on the Court to ensure that the Complaint and Summons were properly served. Service of process is required to be made upon each of the tenants sought to be evicted and may effected by the traditional means of personal or substitute service as set forth in Chapter 48 of the Florida Statutes. However, in certain circumstances, service may also be accomplished by posting the Complaint and Summons on the door to the residence that is the subject of the action. The manner in which the tenant was served may also be important in determining whether damages and costs may be awarded against the tenant.

In addition to entering a default judgment, prompt review of the pleadings identification of any challenge to the court’s jurisdiction that may require the case to be transferred to the circuit court. Cases may also be set for hearing to determine rent or may be set for trial. Eviction cases are handled using the summary procedure set forth in Chapter 51 of the Florida Statutes. A flowchart depicting steps in the consideration of landlord-tenant cases by Judge Robert W. Lee is appended to these materials.

II. Jurisdiction of the County Court

The County Court has jurisdiction to, “consider landlord and tenant cases,” § 34.011(1), Fla. Stat., and exclusive jurisdiction to hear proceedings relating to, “the right of possession of real property and to the forcible or unlawful detention of lands and tenements,” § 34.011(2), Fla. Stat., unless:

1. Amount in controversy exceeds the county court’s jurisdiction; or
2. The Circuit Court has jurisdiction pursuant to § 26.012, Fla. Stat.
   1. The county court may issue a temporary and permanent injunction where appropriate for violation of § [83.40](https://web2.westlaw.com/find/default.wl?rp=%2ffind%2fdefault.wl&vc=0&DB=1000006&DocName=FLSTS83%2E40&FindType=L&AP=&fn=_top&rs=WLW7.01&mt=Florida&vr=2.0&sv=Split), Fla. Stat., et seq., however, the circuit court may issue injunction for possession. Grant v. GHG014, LLC,65 So.3d 1066 **(**Fla.4th DCA 2010**)** held that the trial court did not abuse its discretion by denying putative tenants' motion for temporary injunction for immediate possession of residential apartment, where the threshold question as to the existence of a landlord-tenant relationship was not established by evidence clear and free from reasonable doubt.
   2. In cases transferred to the circuit court pursuant to [Rule](https://web2.westlaw.com/find/default.wl?rp=%2ffind%2fdefault.wl&vc=0&DB=1000006&DocName=FLSTRCPR1%2E170&FindType=L&AP=&fn=_top&rs=WLW7.01&mt=Florida&vr=2.0&sv=Split) [1.170(j), Fla. R. Civ. Proc.](https://web2.westlaw.com/find/default.wl?rp=%2ffind%2fdefault.wl&vc=0&DB=1000006&DocName=FLSTRCPR1%2E170&FindType=L&AP=&fn=_top&rs=WLW7.01&mt=Florida&vr=2.0&sv=Split), e.g. where T files counterclaim for damages in excess of jurisdictional amount, or [Rule 7.100(d), Florida Small Claims Rules](https://web2.westlaw.com/find/default.wl?rp=%2ffind%2fdefault.wl&vc=0&DB=1000006&DocName=FLSTSMCLR7%2E100&FindType=L&AP=&fn=_top&rs=WLW7.01&mt=Florida&vr=2.0&sv=Split), the claims of all parties, including eviction claim, shall be resolved by the circuit court. Herrell v. Seyfarth, Shaw, Fairweather & Geraldson, 491 So. 2d 1173 (Fla. 1st DCA 1986), CKN Airways, Inc. v. Flagler County, 441 So. 2d 1103 (Fla. 5th DCA 1983).

C. Jurisdictional Determination – Traditional Analysis

1. Where T claims possession based on right, title or interest other than lease or landlord-tenant relationship, Court is required to hold evidentiary hearing to determine existence of residential tenancy. Frey v. Livecchi, 852 So. 2d 896 (Fla. 4th DCA 2003).
2. Court errs in requiring deposit prior to determining existence of residential tenancy and if Court determines:
3. Possession not based on residential tenancy, eviction not proper remedy and summary procedure not available. Grimm v. Huckabee, 891 So. 2d 608 (Fla. 1st DCA 2005).

D. Jurisdictional Determination – Recent Amendment and Case Law

1. Where T claims possession based on right, title or interest other than lease or LL-T relationship, county court is divested of jurisdiction and should transfer case to circuit court.
   * + 1. T’s claim that possession is held by virtue of contract for sale divests jurisdiction, [Minalla v. Equinamics Corp.](http://web2.westlaw.com/result/result.aspx?vr=2.0&sskey=CLID_SSSA63482&effdate=1%2f1%2f0001+12%3a00%3a00+AM&rlt=CLID_QRYRLT73482&fmqv=s&rlti=1&ss=CNT&rs=WLW8.01&n=31&eq=Welcome%2fFlorida&db=FL-CS&cnt=DOC&sv=Split&rp=%2fWelcome%2fFlorida%2fdefault.wl&scxt=WL&cfid=1&fn=_top&rltdb=CLID_DB63482&mt=Florida&service=Search&query=LANDLORD+%26+TENANT+%26+da(aft+12%2f31%2f2006)&method=TNC), 954 So. 2d 645, 648 (Fla. 3d DCA 2007), “[section 83.60](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW8.01&fn=_top&sv=Split&tc=-1&findtype=L&docname=FLSTS83.60&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=Florida) does not apply when the occupancy is under a contract for sale of a dwelling unit or the property of which it is a part. [83.42(2), Fla. Stat. (1999)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW8.01&fn=_top&sv=Split&tc=-1&findtype=L&docname=FLSTS83.42&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=Florida).”
       2. Claim of equitable interest in property divests jurisdiction. Toledo v. Escamilla, [962 So. 2d 1028, 1030 (Fla. 3d DCA 2007)](http://web2.westlaw.com/find/default.wl?tf=-1&serialnum=2012871072&rs=WLW9.02&referencepositiontype=S&ifm=NotSet&fn=_top&sv=Split&referenceposition=1030&findtype=Y&tc=-1&ordoc=2017771585&db=735&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31) holding that “ejectment, not eviction, was the proper remedy, and the matter should have been transferred to the circuit court” when defendant in eviction action “asserted in her answer that she was not a tenant and that she had an equitable interest in the property.” See, Ward v. Estate of Ward, 1 So. 3d 238, (Fla. 1st DCA 2008) and Hernandez v. Porres, 987 So. 2d 195 (Fla. 3d DCA 2008).
       3. Jurisdiction may be divested by T exercising an option to purchase and holding possession pursuant to that exercise. Twelfth Ave. Investments, Inc. v. Smith, 979 So. 2d 1216, (Fla. 4th DCA 2008).
       4. Exercise of an option to purchase may be barred by the eviction judgment. T should have brought the specific performance claim in the eviction proceedings as the eviction and the specific performance of the option contract were “essentially connected.” Sena v. Pereira, 179 So. 3d 433, 435 (Fla. 4th DCA 2015).
     1. Complaint for “ejectment” invokes jurisdiction of circuit court and divests county court of jurisdiction. Pro-Art Dental Lab, Inc. v. V-Strategic Group, LLC, 986 So. 2d 1244 (Fla. 2008). The county court lacked subject-matter jurisdiction to entertain the ejectment action that LL specifically sought through its “ejectment” summons and “ejectment” complaint. See, [Art. V, § 20(c)(3), Fla. Const](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLCNART5S20&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31).; [§ 26.012(2)(f), Fla. Stat](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTS26.012&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31). (2006).
        1. Pro-Art Dental Lab observed that by filing complaint LL, “made the conscious decision to seek ejectment, along with a damages claim, in a county court despite the fact that ejectment actions are subject to the exclusive original jurisdiction of Florida's circuit courts.”
        2. Pro-Art Dental Lab holds that T may challenge the county court's subject-matter jurisdiction at any stage of this litigation. [Fla. R. Civ. P. 1.140(b), (h)(2)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTRCPR1.140&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31" \t "_top) and discussed nature and elements of ejectment action in circuit court, an unlawful-detainer action in county court, or a tenant-removal action in county court. See, [§§ 26.012(2)(f)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTS26.012&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31), [34.011, Fla. Stat](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTS34.011&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31). (2006); see also [§§ 66.021](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTS66.021&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31) (ejectment), 82.04-.05 (unlawful detainer), 83.20-.21(tenant removal or eviction), Fla. Stat. (2006).

E. Effect of 2013 Amendment to § 83.42(2), Fla. Stat.

Pursuant to Chapter 2013-136 of the Laws of Florida, effective July 1, 2013, section 83.42(2) is amended to reads as follows:

83.42 Exclusions from application of part.—

This part does not apply to:

(2) Occupancy under a contract of sale of a dwelling unit or the property of which it is a part in which the buyer has paid at least 12 months’ rent or in which the buyer has paid at least 1 month’s rent and a deposit of at least 5 percent of the purchase price of the property.

The effect of this provision permits a tenant/buyer under a lease-purchase agreement to avoid eviction where he or she has paid either 12 month’s rent or 1 month’s rent together with a deposit of 5% of the purchase price. This creates an exception to the ruling in Pro-Art Dental Lab, Inc., *supra*, to the effect that a tenant’s interest as a prospective purchaser under a lease-purchase agreement divests the court of jurisdiction to evict. However, the provision does not clarify whether, consistent with the prevailing interpretation of Pro-Art Dental Lab, Inc., the circuit court should determine whether the tenant/buyer has performed sufficiently to divest the county court of jurisdiction or whether that is a question for the county court.

We find that the specific performance claim is barred by the eviction judgment. The tenant alleged in the second suit that the option contract was an “essential part of the lease transaction.” Indeed, if the tenant had fulfilled the requirements of the option contract, eviction would not have been possible. As such, the tenant should have brought his specific performance claim in the eviction proceedings as the eviction and the specific performance of the option contract were “essentially connected.”

Sena v. Pereira, 179 So. 3d 433, 435 (Fla. 4th DCA 2015)

III. Condominium and Homeowner Association Evictions

§ 718.116(11), Fla. Stat., authorizes a condominium association to demand payment of rent from the tenant of a unit owner if the owner is delinquent in payment of the condominium assessments. Upon delivery of the demand, the tenant is obligated to pay to the association any monetary obligations that would be due to the owner. The Condominium Act and the Homeowners' Association Act have virtually identical provisions, effectively garnishing the rent upon demand for so long as the owner is in arrears in the payment of assessments. Compare § 718.116(11) with § 720.3085, Fla. Stat.

1. Association’s Acquisition of Rent.

Pursuant to the provisions of § 718.116(11), the tenant is required to pay monetary obligations to the Association until the tenant is released by the association or by the terms of the lease. § 718.116(11)(a). The tenant may invoke a defense of prepayment where the tenant has prepaid rent to the unit owner and provides proof within 14 days of the association’s demand. § 718.116(11)(b). The tenant must make all accruing rent payment thereafter to the Association which will be credited against the monetary obligations of the unit owner to the Association. § 718.116(11)(b). A tenant who responds in good faith to a written demand from an Association shall be immune from any claim from the unit owner and is protected from retaliatory eviction. See, § 83.64(1), Fla. Stat.

2. Association’s Eviction.

Following the furnishing of the notice, if a tenant fails to pay the rent, the Association may evict the tenant using the procedure set forth in Chapter 83, Fla. Stat. The Association is not otherwise considered a landlord under Chapter 83 and has no obligations to maintain the premises under § 83.51, Fla. Stat. The Association may pursue an action for injunction to remove a tenant from the property following persistent rule violations is, however, would not be an action under Chapter 83.

a. The tenant’s liability to the association may not exceed the amount due from the tenant to the landlord. § 718.116(11)(c). As a practical matter an Association’s proof nonpayment of rent under § 718.116 may be problematic. The Association is not in contractual privity with the tenant and the tenant and landlord may refuse to provide any documentation that would resolve the issue, absent being compelled through discovery.

b. The unit owner must provide the tenant a credit against rent payments for the amount of monetary obligations paid to the Association. § 718.116(11)(c). The landlord appears to retain the right to evict the tenant for lease violations other than the payment of rent. The tenant’s payments do not give the tenant voting rights or the right to examine the books and records of the Association. § 718.116(11)(e). If a court appoints a receiver, the effects of § 718.116(11), may be superseded. See, § 718.116(11)(f).

IV. Mortgage Foreclosure Eviction

Generally, the foreclosure of a residential mortgage will extinguish a lease entered into after the date of the mortgage and result in the dispossession of the tenant. A tenant’s “possession, as well as title, is at issue in a foreclosure action in respect to all parties to the action.” *Redding v. Stockton, Whatley, Davin & Co.*, 488 So.2d 548, 549 (Fla. 5th DCA 1986) Following the entry of the judgment foreclosing the tenant’s possession, the relationship of the party to whom the certificate of title was issued and the former tenant was that of, “owner and trespasser—the exact situation for which a writ of possession is required. Redding's [the tenant’s] lease was extinguished simultaneously with his landlord's title, from whence it was derived.” *Id*. See also, Florida Rules of Civil Procedure 1.580. The [Protecting Tenants at Foreclosure Act of 2009](http://www.fdic.gov/news/news/financial/2009/fil09056a.pdf), [12 U.S.C. § 5220](http://web2.westlaw.com/find/default.wl?vc=0&ordoc=2021929466&rp=%2ffind%2fdefault.wl&DB=1000546&DocName=12USCAS5220&FindType=L&AP=&fn=_top&rs=WLW10.05&pbc=A0EA825C&ifm=NotSet&mt=93&vr=2.0&sv=Split), (PTFA) alleviated this circumstance by giving a tenant holding possession under “bona fide” residential lease at least ninety days’ to vacate following the foreclosure of a “federally-related mortgage loan.” However, this act, by its own terms, was repealed effective December 31, 2014.

1. Application of § 83.561, Fla. Stat.

Following the expiration of the federal law, the 2015 Florida legislature enacted § 83.561, Fla. Stat., providing that the purchaser takes title to a tenant-occupied residential property following a mortgage foreclosure sale subject to the right of the tenant to remain in possession of the property for 30 days following delivery of written notice. § 83.561(4) provides that unless the purchaser assumes the landlord’s lease obligations or enters into a new lease, the mortgage foreclosure purchaser, “does not assume the obligations of a landlord” except for the 30 day notice period. During the 30 day notice period the purchaser is prohibited from engaging in self-help or other practices prohibited by § 83.67, Fla. Stat. The form of the 30 day notice of termination notice is set forth in the statute. Upon affidavit that the notice was given and the expiration of the 30 day period, the Court entering the mortgage foreclosure judgment may cause a writ of possession to issue.

a. Requirements. § 83.561 embodies provisions similar to the “bona fide” lease requirement of the PTFA. Relief under this statute is not available, if the tenant is the mortgagor in the foreclosure or “the child, spouse, or parent of the mortgagor,” if the lease was not the product of an “arm's length transaction,” or, unless reduced by a government subsidy, if the rent is “substantially less than the fair market” for the premises.

b. Private Cause of Action. Whether § 83.561 creates a private cause of action by the tenant for possession or damages is a recurring issue. It may be argued that § 83.48, Fla. Stat., contemplates a cause of action for violations of the Landlord Tenant Act, unless expressly prohibited. However, unlike other alleged violations of a landlord’s duties, the issuance of a writ of possession only occurs by virtue of judicial action. The prior PTFA was uniformly construed not to create a private cause of action. See, *Construction and Application of Protecting Tenants at Foreclosure Act of 2009*, 65 A.L.R. Fed. 2d 217. If so construed § 83.561 would not create a private cause of action for damages against the mortgage foreclosure purchaser, except for a violation of the landlord’s duties, undertaken by the purchaser pursuant to § 83.67. However, if a party to the mortgage foreclosure lawsuit, or permitted to intervene, a tenant may object to the issuance of a writ of possession based upon non-compliance with § 83.561.

2. Depositing Rent During Pendency.

When participating in the foreclosure lawsuits, tenants have sometimes been authorized by the Court to deposit rent into the court registry during the pendency of the action.  The tenant is then in a position to request reduction in the payment due to the condition the premises or to offset repairs during.  Note: if the Court in the final foreclosure judgment omits to retain jurisdiction over the rent in the registry, it may be required to be returned to the tenant. See, *Noimbie v. Harvey*, 137 So. 3d 606 (Fla. 4th DCA 2014).

3. Notice to the Tenant.

Often tenants are not impleaded as parties to the mortgage foreclosure lawsuit or are identified as only “unknown tenants.” In this circumstance, an issue sometimes arises with respect to the notice required to be given to tenants to be dispossessed as a result of a mortgage foreclosure. The rationale for requiring tenants to be added as parties to the lawsuit prior to the issuance of a writ of possession has involved a purported right of redemption. See, *Morris v. Osteen*, 948 So.2d 821 (Fla. 5th DCA 2007) holding that, “[t]he right of redemption may be exercised by the ‘mortgagor or the holder of any subordinate interest,’ including lessees. [§ 45.0315, Fla. Stat](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000006&cite=FLSTS45.0315&originatingDoc=I20be0d0da7ca11dbab489133ffb377e0&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). (2005); [*Dundee Naval Stores Co. v. McDowell,* 65 Fla. 15, 61 So. 108, 112 (1913)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1913000225&pubNum=734&originatingDoc=I20be0d0da7ca11dbab489133ffb377e0&refType=RP&fi=co_pp_sp_734_112&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_734_112); [*Burns v. Bankamerica Nat'l Trust Co.,* 719 So.2d 999, 1001 (Fla. 5th DCA 1998)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998222067&pubNum=735&originatingDoc=I20be0d0da7ca11dbab489133ffb377e0&refType=RP&fi=co_pp_sp_735_1001&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_735_1001); [*Riley v. Grissett,* 556 So.2d 473, 475 (Fla. 1st DCA 1990)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990031012&pubNum=735&originatingDoc=I20be0d0da7ca11dbab489133ffb377e0&refType=RP&fi=co_pp_sp_735_475&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_735_475).” However, the tenant’s right of redemption appears to be derived from the mortgagor. See, *Burns v. Bankamerica National Trust Co.*, 719 So.2d 999, 1001 (Fla. 5th DCA 1998), holding that lessees have, “no independent right to redemption.” A tenant has no right to intervene in the proceedings post-judgment*. Sedra Family Ltd. P'ship v. 4750, LLC*, 124 So.3d 935, 936 (Fla. 4th DCA 2012) upheld the denial of a tenant’s post-judgment intervention, stating, “[T]he general rule—universally—is that intervention may not be allowed after final judgment, save in the interests of justice.”

a. Tenant’s Right of Redemption. While it has been argued that § 83.561 conveys to the tenant a right of redemption under [§ 45.0315](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000006&cite=FLSTS45.0315&originatingDoc=I20be0d0da7ca11dbab489133ffb377e0&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), Fla. Stat., consistent with the more common interpretation of § 83.561, writs of possession have been issued without the tenant being made a party to the lawsuit. § 83.561(2) provides that the Court may issue a writ placing the purchaser in possession upon an “affidavit that the 30-day notice of termination was delivered to the tenant and the tenant has failed to vacate the premises,” Foreclosure does not adjudicate rights of possession, except when the Court issues a writ of possession and although a tenant may be entitled to dispute the issue of possession at a jury trial under the Landlord Tenant Act, the foreclosure proceedings and the application of § 83.561 would not appear to permit a jury trial on the issue.

b. Current Practice Under § 83.561, Fla. Stat. § 83.561 has been implemented in the Sixth Circuit Administrative Order 2016-020 PA/PI-CIR, dated April 1, 2016. Section IV.B.2 of the order permits a mortgage foreclosure purchaser who has delivered to the occupant a ‘Notice To Tenant of Termination’ in conformity with § 83.561(1)(c) , “may then prepare an application for ex-parte [sic] Writ of Possession, based upon sworn affidavit evidencing compliance with the statute.” Under this procedure, the Court may, upon compliant post-judgment affidavit, direct the issuance of writs of possession without affording the tenant a hearing or permitting the tenant to intervene in the lawsuit. For a contrary view see, *The Due Process Rights of Residential Tenants in Mortgage Foreclosure Cases*, by Henry Rose, 41 New Mexico Law Review 407 (Fall, 2011).

V. Deposit of Accrued Rent into the Registry

§ 83.60(2), Fla. Stat., requires deposit of accrued rent into the registry before the Court may consider the merits of any of T’s defenses, except the defense of payment. However, service of process is required to confer jurisdiction. Upon the Court determining that it has jurisdiction,

* Before considering the sufficiency of the complaint, the sufficiency of any 3-day or 7-day notice, or the validity of any defense raised by T,
* Except for the defense of payment, § 83.60(2) requires payment of the accrued rent alleged in the complaint, and all rent as it accrues, into the court registry.
* Unless T advances a legally sufficient motion to determine rent, supported by documentation indicating that the amount of rent claimed is in error,
* If T fails to deposit the accrued rent, the court may not set a date for mediation or trial,
* But must enter a default judgment for removal of T with a writ of possession to issue immediately.

Pursuant to Chapter 2013-136 of the Laws of Florida, effective July 1, 2013, subsection (2) of section 83.60, Florida Statutes, is amended to read:

83.60 Defenses to action for rent or possession; procedure –

(2) In an action by the landlord for possession of a dwelling unit, if the tenant interposes any defense other than payment, including, but not limited to, the defense of a defective 3-day notice, the tenant shall pay into the registry of the court the accrued rent as alleged in the complaint or as determined by the court and the rent that which accrues during the pendency of the proceeding, when due. . . . and [if timely payment is not made] the landlord is entitled to an immediate default judgment for removal of the tenant with a writ of possession to issue without further notice or hearing thereon.

This section was amended to specifically include a defective 3-day notice to reiterate the legislative intention to evict despite a deficient notice or complaint, where T has failed to deposit the accrued rent.

§ 83.60(2) was held constitutional in Karsteter v. Graham Companies, 521 So. 2d 298 (Fla. 3d DCA) rev. denied, 529 So. 2d 694 (Fla.1988).

1. Judicial Interpretation of § 83.60(2).

Stanley v. Quest Intern. Inv., Inc., 50 So.3d 672 (Fla. 4th DCA 2010) affirmed default judgment of eviction holding that residential tenant was required to deposit the undisputed rent into the court registry in order to raise defense of defective three-day notice, despite tenant's contention that a proper three-day notice was a condition precedent to landlord’s removal action. Notice requirement was unnecessary to establish subject matter jurisdiction and statute defining tenant's responsibilities in a lawsuit with LL made failure to pay rent into the court registry an absolute waiver of all defenses other than payment.

First Hanover v. Vasquez, 848 So. 2d 1188, (Fla. 3d DCA 2003) held that despite T’s fraud in the inducement claim, T is required to deposit rent as a condition of remaining in possession, “irrespective of their defenses and counterclaims.”

However, prior to defaulting T for failure to deposit rent into registry, the trial court is required to conduct evidentiary hearing regarding whether lease had commenced imposing T a duty to make monthly payments of rent, where T disputed whether lease conditions precedent were satisfied and whethert T had ever taken possession of premises under lease. RSG, LLC v. Lenet, 107 So. 3d 1187 (Fla. 3d DCA 2013)

1. Deposit of Accrued Rent in Commercial Tenancies.

Interpreting similar language in § 83.232(5), Fla. Stat., 214 Main Street Corp. v. Tanksley, 947 So. 2d 490 (Fla. 2d DCA 2006) held T’s failure to pay accrued rent under commercial lease entitled LL to possession of the property without hearing and Court lacked discretion to relieve T of obligation to pay rent into registry Court as previously ordered. See,Blandin v. Bay Porte Condominium Ass'n, Inc.,988 So. 2d 666 (Fla. 4th DCA 2008), holding the Court lacked authority to excuse deposit requirement in commercial lease.

1. Default was held to be appropriate in a commercial lease under § 83.232(5) even where the failure to deposit was not the defendant’s fault in Park Adult Residential Facility, Inc. v. Dan Designs, Inc., 36 So.3d 811, (Fla. 3d DCA 2010) which stated, “Although we may have ‘rachmones’ for T, see[Lerner v. Brin*,* 608 So.2d 519 (Fla. 3d DCA 1992)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.05&serialnum=1992190926&fn=_top&sv=Split&tc=-1&findtype=Y&ordoc=2022148061&mt=Florida&db=735&utid=1&vr=2.0&rp=%2ffind%2fdefault.wl&pbc=23704B56), the law is the law. It is not our job to carve exceptions into an othe\_rwise clear and imperative statute.”

2. Under the mandatory terms of §83.232(5), the trial court lacked discretion to stay the final judgment of possession upon “good cause” where commercial tenant had failed to deposit accrued rent and landlord was entitled to immediate possession of the property. Stetson Management Co., Inc. v. Fiddler's Elbow, Inc., 18 So.3d 717 (Fla. 2d DCA 2009).

3. Depositing full rent does not preclude challenge to validity of lease or entitlement to rent. Dream Closet, [Inc](http://web2.westlaw.com/find/default.wl?rs=WLW9.01&ifm=NotSet&fn=_top&sv=Split&findtype=l&docname=CIK(LE00048754)&db=CO-LPAGE&vr=2.0&rp=%2ffind%2fdefault.wl&mt=Florida). v. Palm Beach Mall, LLC,991 So.2d 910 (Fla. 4th DCA 2008).

1. Deposit Required Despite Counterclaim.

Even if T files a counterclaim, T must still post the alleged rent in the registry of the court. K.D. Lewis Enterprises Corp. Inc. v. Smith, 445 So. 2d 1032 (Fla. 5th DCA 1984). However T only loses right to possession of the premises and does not lose right to pursue other claims. Premici v. United Growth Properties, 648 So. 2d 1241 (Fla. 5th DCA 1995). Statute providing that failure of T to pay rent into court registry shall be deemed absolute waiver of T’s defenses means T’s defenses to LL’s claim for possession NOT to claim for money damages.

1. Deposit of Accrued Rent in Public Housing Tenancies.

T’s receiving rent subsidies or public housing are only required to deposit portion of rent that tenant would be responsible to pay pursuant to federal, state or local government program which they are participating.

VI. Motions to Determine Rent

The complaint must allege amount of rent owed and amount of rent that will come due and T is entitled to challenge the amount alleged by filing a Motion to Determine Rent.

1. If tenant files motion for determination of rent to be paid into registry of the court, tenant must attach to motion documentation to show rent alleged in complaint is in error. If T files a legally sufficient a motion to determine rent, the court should conduct hearing to determine the amount of rent T to be posted. Olszewska v. Ferro, 590 So. 2d 11 (Fla. 3d DCA 1991). The hearing is limited in scope-only to determine an amount of rent to be posted.
2. However, an ambiguity in a lease provision addressing calculation of base rent required trial court to consider extrinsic evidence before ordering tenant to deposit rent into court registry. Charbonier Food Services, LLC v. 121 Alhambra Tower, LLC, 206 So. 3d 755 (Fla. 3d DCA 2016).
3. Where the amount to be deposited exceeds $15,000.00, the jurisdictional limit of the county court, the case should be transferred to circuit court. Good To Go Food Store, Inc. v. LRM Realty, LLP, 93 So.3d 362 (Fla. 2d DCA 2012).
4. In T’s action against for constructive eviction, Court had discretion to permit accrued rent to be deposited into registry pending determination of base rent. Tixe Designs, Inc. v. Green Ice, Inc., 207 So. 3d 348 (Fla. 3d DCA 2016).

VII. Grounds for Eviction

Eviction may be based on grounds under the lease and the applicable statutes. Nonpayment of rent is the most commonly alleged ground for eviction. However, eviction may also be based on a violation of another provision of the lease, rules incorporated into the lease, or am applicable statute. Expiration of the lease or failure to vacate upon notice to terminate a periodic tenancy may also give rise to an eviction. Additional grounds may include unauthorized assignment, intentional damage to the premises, or other emergency. The notice requirements with which LL must comply are different according to the nature of the ground alleged.

A. The Failure to Pay Rent.

§ 83.56(3), Fla. Stat., requires that before a landlord may evict T for nonpayment of rent, LL must first serve T with a written notice that informs T has three days to pay the alleged rent or vacate the premises. If T attempts to pay rent during the 3-day time period, LL must accept the rent. If LL refuses, T will not be evicted.

B. Violation of Lease or Rules.

§ 83.56(2)(a), Fla. Stat., permits a landlord to evict a tenant by giving written notice that T has 7 days to vacate the premises. Notice must state with specificity the alleged lease or rule violation. Failure to specify facts permitting eviction will deprive LL of possession. LL will be limited at trial to violation alleged in notice.

Only 2 circumstances where LL does not have to give T opportunity to cure:

a. Emergency evictions. An act committed by T which is impossible to cure. § 83.56(2)(a) gives as an example: “damage, destruction or misuse of LL’s or other T’s property by an intentional act,” including battery and threatening another tenant.

b. Second violation within one year of reasonable rule or lease provision, provided the similar violation occurred within previous 12

months and T was furnished a specific written warning that a repeated violation will be grounds for eviction.

C. Expiration of Lease with No Specific Term

Where there is agreement as to the duration of the tenancy, the tenancy, the duration is determined by the periods for which the rent is payable, e.g. the tenancy is month to month, if payment is due monthly. § 83.46(2), Fla. Stat. As set forth in § 83.57, Fla. Stat., if there is a lease without a specific term or a periodic tenancy either party may terminate upon **at least** the following notice:

1. Year to Year – 60 days prior to end of any annual year;

2. Quarter to Quarter – 30 days prior to the end of any quarterly period;

3. Month to Month – 15 days prior to end of any monthly period;

4. Week to Week – 7 days prior to end of any weekly period;

D. Termination Upon Notice

The lease terms govern the parties’ ability to terminate the lease upon notice, within the confines of § 83.575, Fla. Stat., as recently amended.

Pursuant to Chapter 2013-136 of the Laws of Florida, effective July 1, 2013, subsection (1) of section 83.575 Florida Statutes, is amended to read:

83.575 Termination of tenancy with specific duration.—

(1) A rental agreement with a specific duration may contain a provision requiring the tenant to notify the landlord within a specified period before vacating the premises at the end of the rental agreement, if such provision requires the landlord to notify the tenant within such notice period if the rental agreement will not be renewed; however, a rental agreement may not require more than 60 days’ notice from either the tenant or the landlord.

This amendment makes the termination upon notice provisions reciprocal, requiring T to provide such notice, if LL is under the same obligation. It applies to leases with specific term, rather than month-to-month tenancies. Notice from either LL or T cannot exceed 60 days.

E. Expiration of Employment Tenancy, § 83.46(3), Fla. Stat

1. If T receives the tenancy as part of T’s employment and the employment is terminated, LL is entitled to rent from day after employment ceases until day unit vacated at rate equal to rate for similarly charged residences.
2. If wages are payable weekly or more frequently then tenancy is week to week and must give 7 days’ notice to vacate prior to end of any week. If wages are payable monthly or no wages are payable, then tenancy is month to month and must give 15 days’ notice prior to end of month.

F. Criteria for Assignment

Unless precluded by lease, T may assign upon consent of LL, but consent may not be unreasonably withheld. Speedway SuperAmerica, LLC v. Tropic Enterprises, Inc., 966 So. 2d 1 (Fla. 2d DCA 2007) identified criteria in commercial lease for withholding consent to include (a) financial responsibility of the proposed subtenant (b) the ‘identity’ or ‘business character’ of the subtenant, i.e., suitability for the particular building, (c) the need for alteration of the premises, (d) the legality of the proposed use, and (e) the nature of the occupancy, i.e., office, factory, clinic, etc.

VIII. Notice Requirements

With limited exceptions, written notice is required for LL to terminate the tenancy. For termination based upon non-payment of rent a 3-day notice is required. For termination based upon violation of the lease, rules or statutes, a 7-day notice is generally required. The recent amendments permit termination without notice for violation of the lease where a prior notice for the same violation was furnished within the preceding 12 months. All termination notices must be in writing. Morse v. State, 604 So. 2d 496 (Fla. 1st DCA 1992). However, if the notice of termination is deficient, the case may not be dismissed until the landlord is furnished an opportunity to amend the notice and the pleadings.

A. Notice Requirements: Non Payment of Rent – The 3-day Notice.

1. The notice must inform T of the amount of rent owed. The notice may claim overdue rent, however, rent may include taxes or late fees where characterized as additional rent in the lease. See, § 83.43(6), Fla. Stat., and Cascella v. Canaveral Port Authority, 827 So. 2d 308, (Fla. 5th DCA 2002).
2. The notice must not be given prior to the rent becoming due and must state that T has 3 days to pay the overdue rent or vacate the premises. The notice should exclude Saturdays, Sundays and legal holidays, those observed by a court as set forth in § 83.56(3), Fla. Stat.
3. Notice is defective if it does not contain description of the premises to be vacated and the address to which the payment is to be made, however, where T is not prejudiced by the absence of such address county courts have deemed the notice not substantially deficient.
4. Notice can be sent by mailing, delivering copy, or leaving copy at residence - usually posted. However, if mailed, add 5 days for compliance in the notice. Fla. R. Civ. P.1.090(e); Investment and Income Realty, Inc. v. Bentley, 480 So. 2d 219 (Fla. 5th DCA 1985).
5. Notice may state that payment can only be made in cash even though statutory form did not include “cash” requirement. Moskowitz v. Aslam, 575 So. 2d 1367 (Fla. 3d DCA 1991).
6. Excluded from rent that may be claimed in a 3-day notice are damages, attorney fees, court costs and sheriff’s fees, late fees except where lease contains provisions specifically identifying late fees as additional rent, and interest.

B. Notice Requirements: Curable Violations – § 83.56(2)(b), Fla. Stat.

1. When a tenant commits a curable violation, LL must give T 7 days to cure the violation. If violation is not cured, then LL may proceed with eviction.

2. The 7-day notice must state the specific violation (for example, the type of criminal activity T is engaging in) and that it must be cured within 7 days.

C. Notice Requirements for public housing.

1. LL of publicly assisted housing is required to give a tenant 14 days’ notice that he has failed to pay rent. 24 C.F.R. § 966.4(l)(3)(i)(A).The notice must also inform T of his right to examine PHA documents concerning termination of the tenancy and the right to a grievance hearing.

a. Notice must be in writing.

b. Must be delivered by hand delivery to T or an adult member of the household or by first class mail.

c. Posting is not permitted.

2. Section 8 notice requirements: same as private housing except LL must first give notice to the PHA before LL may evict. 24 C.F.R. § 882.21(c)(4).

D. Notice requirement for non-curable violations: § 83.56(2)(a), Fla. Stat.

Where the eviction is based upon intentional damage or other emergency or non-curable violation within the meaning of § 83.56 (2)(a), the eviction lawsuit may proceed without prior notice. A recent amendment clarified that notice is also not required where the eviction is based upon a repetition of the same violation within 12 months of T being given notice of the earlier violation.

Pursuant to Chapter 2013-136 of the Laws of Florida, effective July 1, 2013, section 83.56, Florida Statutes, is amended to read:

83.56 Termination of rental agreement.—

(2)(b). . . If such noncompliance recurs within 12 months after notice, an eviction action may commence without delivering a subsequent notice pursuant to paragraph (a) or this paragraph.

(4). . . Then notice requirements of subsections (1), (2), and (3) may not be waived in the lease.

This amendment relates to a second violation of the lease of the same type “such noncompliance” within a year after notice of an earlier such violation, the second violation is a non-curable violation. In such circumstances, LL is not required to give notice before eviction. The amendment reiterates that notice, where it is required by the statute, may not be waived in the lease.

E. Defective Notice

Pursuant to Chapter 2013-136 of the Laws of Florida, effective July 1, 2013, subsection (1) of section 83.60, Florida Statutes, is amended to read:

83.60 Defenses to action for rent or possession; procedure.—

(1)(a) In an action by the landlord for possession of a dwelling unit based upon nonpayment of rent or in an action by the landlord under s. 83.55 seeking to recover unpaid rent, the tenant may defend upon the ground of a material noncompliance with s. 83.51(1), or may raise any other defense, whether legal or equitable, that he or she may have, including the defense of retaliatory conduct in accordance with s. 83.64. The landlord must be given an opportunity to cure a deficiency in a notice or in the pleadings before dismissal of the action.

1. The effect of this amendment is to preclude dismissal, even without prejudice, where the 3-day or 7-day notice is defective. Until this amendment, a proper 3-day or 7-day notice was a condition precedent to filing the eviction lawsuit. Although a defective 3-day notice did not deprive the court of jurisdiction, it **previously** required dismissal without leave to amend. See, Bell v. Kornblatt, 705 So. 2d 113 (Fla. 4th DCA 1998).

2. Under this amendment, a defective notice may result in the action being stayed, rather than dismissed, until LL has an opportunity to issue an amended notice. The amended notice may then be filed with the court as an amendment to the Complaint. A proper 3-day or 7-day notice may be considered a condition to proceeding with the lawsuit, rather than a condition precedent.

3. The length of time to be afforded to LL to serve an amended 3-day or 7-day notice is not set forth in the statute, however, it would appear that it must be sufficient to permit T to reinstate the tenancy by payment or compliance, as appropriate. This amendment is not reciprocal with respect to notice to be given by T, such as a notice of material non-compliance under § 83.56, Fla. Stat.

IX. Complaint, Answer and Summons

The complaint and the requisite termination notice may be amended during the pendency of the eviction lawsuit, pursuant to the amendment to § 83.60(1)(a), Fla. Stat., and are subject to the requirement to deposit the accrued rent set forth in § 83.60(2). However, challenges to the sufficiency of service of process would, if successful, deprive the court of jurisdiction over the person of the defendant. While a deficiency in service of process may be remedied by subsequent, proper service, conditioning a challenge to service of process upon deposit of accrued rent would appear to be violative of due process.

A. The Complaint

1. Comprises a count for eviction and a second count for damages; it may not include a claim for ejectment, which is required to be brought in circuit court. Pro-Art Dental Lab, Inc., *supra*.

2, Is required to attach a copy of written lease, if any, and the notice of termination of tenancy; it should state the facts that form the basis of an eviction and/or an award of damages, and should set forth the address of the premises.

3. Must be filed in the county where the premises are situated and should be advanced by the court on the calendar for an expeditious resolution.

B. The Summons

1. Count I: Possession.

a. In all actions for possession - eviction, LL is entitled to summary procedure as provided in Fla. Stat. § 51.011. T has 5 days to file answer the eviction claim. Berry v. Clement, 346 So. 2d 105 (Fla. 2d DCA 1977), 5 days excludes weekends and legal holidays. Fla. R. Civ. P. 1.090(a).

b. Service: § 48.183(1), Fla. Stat. If T cannot be found in county or there is not a person 15 years or older residing at the T’s usual place of abode in the county after at least 2 attempts to obtain service, LL can attach summons to conspicuous place on the property described in complaint. The minimum time delay between the two (2) attempts shall be 6 hours.

c. Form 1.923 brings summons into conformity with Fla. Stat. § 83.60. The summons advises T:

(1) If T believes that the amount claimed in the complaint is inaccurate, T must file a motion with the clerk to determine the amount to be paid to the clerk together with supporting documentation.

(2) Summons details the separate response that must be filed and given to LL when there is a separate claim for money damages. The forms are also translated into Spanish and Creole.

2. Count II: Rent; damages; attorney fees & costs

a. Service: LL must serve tenant personally or by substitute service if LL seeks a money judgment. § 83.48, Fla. Stat. T has 20 days to answer the damages claim. If claim is less than $5,000.00, the court may proceed under summary claims rules. Fla. Stat. §83.625 (“no money judgment shall be entered unless service of process has been effected by personal service”). See Springbrook Commons, Ltd. v. Brown, 761 So.2d 1192, 1194 (Fla. 4th DCA 2000) (statute also pertains to an award of costs).

b. If summons posted on the rental unit, suit becomes an *in rem* action and LL’s remedy is limited to possession of the premises.

3. Challenge to Service of Process

a. Challenge to service is valid even if T has actual notice. Napoleon Broward Drainage Dist. v. Certain Lands, 33 So. 2d 716 (Fla. 1948).

b. If T does not challenge method of service, it is waived. Hager v Illes, 431 So. 2d 1037 (Fla. 4th DCA 1983)/ T may waive defects in service by answering summary eviction complaint and counterclaiming for affirmative relief and participating fully in trial.

C. Proper Signatories

1. Notice of termination and complaint may be signed by LL, property manager, or an attorney. In accordance with Fla. Stat. § 865.09, failure to comply with fictitious name statute, deprives LL of standing to file suit. The defense of an improper signatory, as well as the scope, qualification, and authority of the property manager, would appear to be defenses subject to the requirement to deposit the accrued rent set forth in § 83.60(2) and would be remedial without dismissal in accordance with § 83.60(1)(a).

2. The Florida Bar Re: Advisory Opinion-Non Lawyer Preparation of and Representation of Landlord in Uncontested Residential Evictions, 605 So. 2d 868 (Fla. 1992) provides that if the eviction is for non-payment of rent and is uncontested, a property manager may draft and serve a 3 day notice, sign and file a complaint, file a motion for default, and obtain a writ of possession.

a. The Florida Bar re: Advisory Opinion-Non-Lawyer Preparation of and Representation of Landlord In Uncontested Residential Evictions, 627 So. 2d 485 (Fla. 1993): A property manager is defined as “one who is responsible for day-to-day management of residential rental property and includes corporate property management firms that have primary responsibility for rental and management of residential rental property and licensed real estate brokers and salesperson.”

b, Designated non-lawyer property managers may handle uncontested residential evictions on behalf of both individual and corporate LLs.Whenever a hearing is required the matter is considered contested.

c. The property manager must have written authorization from the owner to complete, sign and file the eviction action for non-payment of rent, however, that authorization, “ cannot serve to designate the property manager as the plaintiff in the eviction action or to authorize the manager to seek the recovery of past due rent.” The Florida Bar re Advisory Opinion--Nonlawyer Preparation of & Representation of Landlord in Uncontested Residential Evictions, 627 So. 2d 485, 487 (Fla. 1993)

d. Forms which property managers may complete are set forth atIn re Revisions to Simplified Forms Pursuant to Rule 10-2.1(A) of Rules Regulating Florida Bar, 50 So.3d 503 (Fla. 2010).

D. The Answer

1. An answer is required to be filed within 5 days excluding weekends and legal holidays and should contain all legal and equitable defenses. Malt v. R.J. Mueller Enterprises, Inc., 396 So. 2d 1174 (Fla. 4th DCA 1981) (defense of acceptance of late payments by LL.)

2. The filing of a motion to dismiss will not toll the time for an answer. See, Crocker v. Diland, 593 So. 2d 1096 (Fla. 5th DCA 1992) holding that permitting tolling of time by filing a motion to dismiss would undermine summary procedure set forth in Fla. Stat. § 51.011. All defensive motions shall be heard prior to trial and shall be filed also within 5 days of service.

3. An informal answer such as a letter response will serve as an answer. In J.A.R.Inc. v. Universal American Realty Corp., 485 So. 2d 467 (Fla. 3d DCA 1986) the letter to LL asserting informal defense was sufficient to preclude default. However, Colby Materials, Inc. v. Caldwell Const., Inc*,* 926 So.2d 1181 (Fla. 2006) held that where defendant's officer filed motions, rather than an attorney, corporation should be given reasonable opportunity to correct the defect, rather than adverse default judgment.

4. Letter to tenant’s counsel from insurance adjuster working for LL’s insurer which denied liability for tenant’s fire damage and advised that LL was put on notice of potential lawsuit was not a “paper in the action” so as to trigger rule of civil procedure precluding default except by court order since insurance adjuster was neither party to suit nor counsel for party. Americana Associates, Ltd. v. Coleus, 697 So. 2d 573 (Fla. 5th DCA 1997).

X. Default Judgment

The classic default judgment may be entered if an answer is not timely filed. If the accrued rent is not timely deposited into registry of the court, LL may also be entitled to default judgment and writ of possession to issue without notice or hearing. However, if an answer filed and rent posted, then case should be set for trial.

Pursuant to Chapter 2013-136 of the Laws of Florida, effective July 1, 2013, subsection (5)(b) of section 83.56, Florida Statutes, is amended to read:

83.56 Termination of rental agreement –

(5)(b) Any tenant who wishes to defend against an action by the landlord for possession of the unit for noncompliance of the rental agreement or of relevant statutes must comply with the provisions in s. 83.60(2). The court may not set a date for mediation or trial unless the provisions of s.83.60(2) have been met, but must enter a default judgment for removal of the tenant with a writ of possession to issue immediately if the tenant fails to comply with s. 83.60(2).

The amendment to this provision clarifies and reiterates the circumstances under which a default judgment should enter. This provision leaves the court with no alternative – neither mediation nor trial may be scheduled – unless T has deposited the accrued rent in accordance with at § 83.60(2). Excepting only the defense of payment, any other defense, including without limitation, the defense of material noncompliance may be raised only if such deposit is made. Absent such deposit, the statute directs the court to enter a default judgment of eviction authorizing an immediate writ of possession.

XI. Conducting the Hearing

A. Jury Trial. An eviction trial is subject to the rules of evidence and either party may request a jury to decide issues of fact. Cerrito v. Kovitch, 457 So. 2d 1021 (Fla. 1984); Jacques v. Wellington Crop, 183 So. 22 (Fla. 1938); State ex rel. Jennings v. Peacock, 171 So. 821 (Fla. 1937). Of course, by failing to request a jury timely, the parties may waive their right to a jury trial. C & C Wholesale, Inc. v. Fusco Management Corp., 564 So. 2d 1259 (Fla. 2d DCA 1990).

B. Property Managers. Although property managers are permitted to file eviction complaints and proceed to acquire uncontested default judgments, a non-lawyer property manager is not permitted to represent LL at a contest eviction trial. The Florida Bar re: Advisory Opinion-Nonlawyer Preparation of and Representation of Landlord in Uncontested Residential Evictions, 605 So. 2d 868 (Fla.1992), Fla. Stat. § 83.59 (2).

C. Burden of Proof. At the hearing, LL would have the burden of proving by the preponderance of the credible evidence, the existence of the tenancy (§ 83.43(3), Fla. Stat.) by a rental agreement or a periodic tenancy, that there was a breach of the terms of the rental agreement by T, and that proper notice was given to T. (§ 83.56(3), Fla. Stat.; Clark v. Hiett, 495 So. 2d 773 (Fla. 2d DCA 1986)). T would have the burden of proof with respect to defenses of payment, waiver, material noncompliance, or retaliatory eviction.

XII. Public Housing Evictions

Public housing is intended for the most disadvantaged members of the community, impoverished, elderly or disabled residents. Federal regulations promulgated by the Department of Housing and Urban Development (HUD) impose particular responsibilities upon public housing landlords and tenants and provide for additional protections to public housing tenants facing eviction. In addition to dispossession, the eviction of a public housing tenant may affect his or her future eligibility to reside in public housing. The applicable federal regulations are subject to change and judges handling public housing evictions should be apprised of any recent changes.

1. Public Housing Tenancies.

Public housing encompasses two different types of tenancies.

a. Public Housing Authority. The first tenancy is where the premises are owned, operated and/or managed by the Public Housing Authority (PHA). While a private company may manage the building for the housing authority or may even be part of the ownership, the building is still controlled by the housing authority and the tenancy is governed by 24 C.F.R. Part 966.

b. Government Subsidized Housing. The second is government-subsidized housing. Called “Section 8” housing it is authorized by Section 8 of the Housing Act of 1937 (42 U.S.C. § 1437f), as amended. Premises are privately owned and leased by landlords who receive subsidies in exchange for renting to low income tenants. Owners may be individual landlords or corporations. Subsidized housing may be obtained through vouchers used by a tenant to find rental housing in the private market. This subsidy is paid to a private landlord, stays with the tenant and is governed by 24 C.F.R. Part 982. Project-based subsidies are paid to owners who provide affordable multifamily housing. These subsidies stay with the property and are governed by 24 C.F.R. Part 247.

2. Lease Provisions.

The public housing lease contains specific provisions not typically found in a standard form lease. The PHA lease term is required to be one year and to include, unless a violation has occurred, an automatic renewal for the same period. The leases are required to be non-discriminatory and public housing landlords may not require special provisions in leases different from others in the same building. The composition of the household may include only tenant’s family members and other persons approved by the PHA. The PHA lease provides for redetermination of rent and family composition and imposes an obligation on the tenant to transfer to another unit based upon that redetermination.

3. Failure to Pay Rent.

The most common ground for termination of a public housing tenancy is failure to pay rent. The tenant’s portion of the rent is often a small amount, usually between 15 percent and 25 percent of the tenant's income. The tenant may not be evicted for failure to pay the government-subsidized portion of the rental payment. The landlord’s acceptance of the subsidized portion of the rent has not been held to constitute a waiver of the right to proceed with eviction against a public housing tenant in possession.

4. Deposit of Accrued Rent.

The public housing tenant’s failure to deposit their portion of the rent in the registry may, in certain circumstances, entitle the landlord to the entry of a default judgment of eviction. §83.60(2), Florida Statutes, states, in part, that public housing tenants receiving rent subsidies are required to, “deposit only that portion of the full rent for which they are responsible,” pursuant to program in which they are participating. This provision appears intended to preclude defenses except for payment if the public housing tenant’s portion of rent is not deposited in the registry during the pendency of the case.

a. Effect of Failing to Deposit – Deficient Notice. The entry of default judgment as a result of failing to deposit accrued rent would preclude consideration of whether the notice of termination required by federal regulations is defective. However, where specific notice terminating the tenancy is required by federal regulations, state statutes purporting to shorten the notice period have been held invalid as to public housing tenants. See, for example, *Housing Authority of City of Danville v. Love*, 375 Ill. App. 3d 508, 314 Ill. Dec. 528, 874 N.E.2d 893 (4th Dist. 2007) holding a contractual ten-day notice period for a Section 8 tenant conflicted with notice required under federal law and, thus, was unenforceable. Consistent with this analysis, §83.60(2), Fla. Stat., may be ineffective to defeat a federal notice requirement. Cf. *Colvin v. Hous. Auth. of City of Sarasota, Fla.*, 71 F.3d 864 (11th Cir. 1996) holding that a Section 8 tenant was not denied procedural due process when the local housing authority terminated her benefits without hearing, based on Florida state court eviction, where the tenant had a full opportunity to present evidence in the state court eviction proceeding.

b. Notice of Termination – Section 8. Federal regulations pertaining to Section 8 evictions provide for notice of termination to be given in accordance with the requirements set forth in applicable state law. See, 24 C.F.R. § 247.3(a)(1) or (2). Under Florida law, the requirement that accrued rent be deposited into the registry in accordance with Section 83.60(2) limits the ability of a tenant to challenge the sufficiency of the notice. That requirement has withstood constitutional challenge and has not been held to be arbitrary or capricious. See, *Lindsey v. Normet*, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972); *Karsteter v. Graham Companies*, 521 So. 2d 298 (Fla. 3d DCA 1988). It would appear that the sufficiency of the notice called for by federal regulations applying or incorporating notice requirements of Chapter 83 may be challenged provided that the requisite deposit of accrued rent is made.

5. Other Grounds for Eviction.

Pursuant to 24 C.F.R. § 247.3, aside from the nonpayment of rent, a Section 8 tenant may evicted for failing to fulfill an obligation under Chapter 83, for criminal activity or alcohol abuse by the tenant or a household member and for material noncompliance of the rental agreement. The broad definition of material noncompliance includes either a substantial violation of the lease or repeated minor violations of the lease that adversely affect another tenant or the project as well as failing to furnish complete and accurate income and other eligibility information.

A public housing tenant or household member who engages in domestic violence, dating violence or stalking may be evicted notwithstanding any other provision of federal or state law. See, 24 C.F.R. § 5.2009. Other common grounds for eviction under a PHA lease include:

a. Failure to fulfill specified family/household obligations set forth in federal regulations;

b. Being over the income limit for the program, the discovery of false statements in the application or other ineligibility; or,

c. Criminal activity or alcohol abuse.

6. Notice of Termination.

There are specific requirements for the notice terminating a public housing tenancy, depending upon the type of tenancy. The issuance of a notice terminating a public housing tenancy does not relieve the landlord of compliance with notice requirements of Chapter 83. However, the notice may be combined with or run concurrently with a notice required under Florida law.

a. Requirements of PHA Notice of Termination. In addition to stating the specific grounds for termination in PHA evictions, the notice is required to inform the tenant of the tenant's right to answer and to examine PHA documents directly relevant to the termination or eviction. When the PHA is required to afford the tenant the opportunity for a grievance hearing, see 24 C.F.R. §966.51(a)(1), the notice shall also inform the tenant of the tenant's right to request a hearing in accordance with the PHA's grievance procedure.

If not entitled to a grievance hearing, see 24 C.F.R. §966.51(a)(2)(criminal activity or drug abuse), the notice is required to state the tenant is not entitled to a grievance hearing and to specify the judicial eviction procedure to be used. The time for giving the termination notice of a tenancy under a PHA lease is governed by 24 C.F.R. § 966.4. In accordance with that provision, the PHA is required to give the tenant:

(1) 14 days’ notice in the case of failure to pay rent;

(2) Reasonable notice if:

(a) The health or safety of other residents, PHA employees, or persons residing in the immediate vicinity of the premises is threatened;

(b) Any member of the household has engaged in any drug-related criminal activity or violent criminal activity; or,

(c) Any member of the household has been convicted of a felony;

(3) Notice as set forth in Chapter 83 for other lease violations or violations of the Florida Landlord-Tenant Law;

(4) 30 days for all other alleged violation of federal law or regulation.

b. Expiration and “Good Cause.” Prior to terminating a Section 8 tenancy for “good cause” or upon expiration of the lease the landlord must provide at least 30 days notice as to the grounds for termination. 24 C.F.R. § 247.4(a) & (c). An example of "other good cause" for termination in the Housing Assistance Payments (HAP) Contract (form HUD-52641) in Part C, Paragraph 8 d (3)(c) where "good cause may include . . . [a]   business   or   economic   reason   for termination of the tenancy (such as sale of the  property . . .).

The period is substantially shorter, however, for a tenants' noncompliance with major provisions of the lease. 24 C.F.R. 247.4(c); However, see, § 83.56(5)(c), Fla. Stat. which waives a landlord's right to evict if he or she fails to institute an action within 45 days of learning of a violation.

Where the termination notice is based on material noncompliance with the rental agreement or material failure to carry out obligations under Chapter 83, pursuant to 24 C.F.R. § 247.3(a)(1) or (2), the time of service shall be in accord with the rental agreement and Chapter 83. Similar to the termination notice under the PHA lease, the notice is required to be furnished to the PHA.

7. Sufficiency of the Notice.

Sufficiency of the pre-suit notice is a recurring issue in public housing evictions. Tenants who receive federal rent subsidies under Section 8 have “constitutionally protected property rights in an expectation of continued occupancy and receipt of rent and utility subsidies.” *Jeffries v. Georgia Residential Finance Authority,* 678 F.2d 919 (11th Cir. 1982). Private owners of federally assisted housing are subject to constitutional restrictions because of their close involvement with the federal government. *Geneva Towers Tenants Org. v. Federated Mortgage Inv.,* 504 F.2d 483, 487–88 (9th Cir. 1974).

The trial Court’s decision with respect to the sufficiency of the notice in a public housing eviction case should be informed by the overarching constitutional requirements. “The minimum procedural safeguards required by due process in each situation depend on the nature of the governmental function involved and the substance of the private interest which is affected by the governmental action,” [*Escalera v. New York City Hous. Auth.*, 425 F.2d 853, 865 (2d Cir.)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970101860&pubNum=350&originatingDoc=I5e6a22eabdd511dcb595a478de34cd72&refType=RP&fi=co_pp_sp_350_865&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)#co_pp_sp_350_865), *cert. denied*, [400 U.S. 853, 861 91 S.Ct. 54, 27 L.Ed.2d 91 (1970)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970200251&pubNum=708&originatingDoc=I5e6a22eabdd511dcb595a478de34cd72&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)). See, *Linares v. Jackson*, 531 F. Supp. 2d 460, 470-71 (E.D.N.Y. 2008) holding that the Court is required to “use the three-factor balancing test articulated in *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) in deciding whether the demands of the Due Process Clause are satisfied,” *quoting Krimstock v. Kelly,* 464 F.3d 246, 253 (2d Cir. 2006).

“First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews v. Eldridge,* 424 U.S. at 335.

As indicated above, the notice of termination for violations other than non-payment of rent should be fairly specific in a public housing scenario.  The HUD Handbook, 4350.3 REV-1, Section 8-6, paragraph A. 3, recommends that the incidents be described specifically including the date, location and names of persons involved.  For a well-researched, thoughtful analysis of the sufficiency of a termination notice in a Section 8 case see, *Order on Defendant’s Motion for Summary Judgment*, Case No. 05-2013-CA-039015, *Asbury Arms, Inc. v. Rita Lynar*, Judge Lisa Davidson, Circuit Court, 18th Judicial Circuit, May 28, 2015, a copy of which is appended to these materials.

B. Public Housing – Prohibition on Discrimination

Applicable federal statutes implemented by HUD regulations prohibit discrimination in leasing to and eviction of tenants in government subsidized housing. The Fair Housing Act, as amended 42 U.S.C. 3601-3619 and 3631 prohibits discrimination on the basis of the “protected categories” including race or color, religion, national origin, gender, disability or handicap, age or familial status—including families with children and pregnant women. Violation of the Fair Housing Act may give rise to a cause of action for damages or other relief and may also form the basis of a defense to an eviction from public housing.

1. Fair Housing Act Prohibitions.

The Fair Housing Act prohibits the landlord receiving a government subsidy from any of the following:

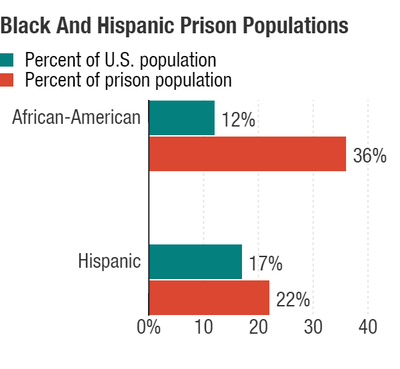
* Publishing any advertising indicating a limitation or preference based on race, religion, or any other protected category;
* Falsely denying that a rental unit is available;
* Imposing a more restrictive standard for selecting tenants for or refusing to rent to protected category members;
* Requiring different terms or conditions for rental of a dwelling unit, such as requiring larger deposits for protected category members; and,
* Terminating a tenancy for a discriminatory reason.

2. Exhaustion of Remedies.

All persons and entities except the Florida Commission on Human Relations must comply with and exhaust the statutory conciliation process before they may commence a civil action under the Florida Fair Housing Act; until the person or entity does so, the trial court lacks subject matter jurisdiction to hear the case. Fla. Stat. Ann. §§ 736.34(1), (4). Hous. Opportunities Project v. SPV Realty, LC, 42 Fla. L. Weekly D44 (Fla. 3d DCA Dec. 21, 2016).

3. Recent HUD Guidance.

In April, 2016 HUD published guidance that declares it a violation of the Fair Housing Act for landlords to impose a blanket exclusion of persons with criminal records. *Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* cites data from the U.S. Equal Employment Opportunity Commission (EEOC) and concludes that because of disproportionate rates of arrest

and conviction of African-Americans and Hispanics,[[1]](#footnote-1) a policy of exclusion of any person having an arrest record may constitute improper discrimination. (The *Guidance*, a copy of which is appended to these materials.) In addition to prohibiting intentional discrimination against protected category members with criminal records, the *Guidance* concludes this policy would he inimical to the goals of successful reintegration and full effect was discriminatory, without any intent to discriminate. As stated in Section III of the *Guidance*,

“A housing provider violates the Fair Housing Act when the provider’s policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate. Under this standard, a facially-neutral policy or practice that has a discriminatory effect violates the Act if it is not supported by a legally sufficient justification. Thus, where a policy or practice that restricts access to housing on the basis of criminal history has a disparate impact on individuals of a particular race, national origin, or other protected class, such policy or practice is unlawful under the Fair Housing Act if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider, or if such interest could be served by another practice that has a less discriminatory effect.”

The *Guidance*, published by HUD’s Office of the General, addresses the evidentiary standard in discrimination claims by plaintiffs and prosecutions by HUD based upon systematic exclusion of persons with des individuals with criminal histories. The *Guidance* references an exemption from the Fair Housing Act liability for exclusion based upon illegal manufacture or distribution of a controlled substance. Aside from that exemption, the *Guidance* evaluates criminal record discrimination claims based on whether: 1. The criminal history policy or practice has a discriminatory effect; 2. The policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest; and, 3. There is a less discriminatory alternative.

Accordingly, a policy or practice that, “fails to consider the nature, severity, and recency of criminal conduct is unlikely to be proven necessary to serve a ‘substantial, legitimate, nondiscriminatory interest’ of the provider” and may tend to subject the landlord to liability under the Fair Housing Act. *Guidance*, Section III, Paragraph B.2. Conversely, consideration of “individualized evidence” such as “the facts or circumstances surrounding the criminal conduct; the age of the individual at the time of the conduct; evidence that the individual has maintained a good tenant history before and/or after the conviction or conduct; and evidence of rehabilitation efforts” would tend to have a less discriminatory effect, particularly where consideration of an applicant’s criminal history is delayed until his or her financial and other qualifications are verified*. Guidance*, Section III, Paragraph C.

4. Disparate Impact.

Although persons with criminal histories are not designated members of a protected category, HUD interpretation of the Fair Housing Act set forth in the Guidance appears likely to be upheld based upon the Supreme Court’s decision in *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 192 L. Ed. 2d 514 (2015) holding that disparate-impact claims are cognizable under the Fair Housing Act. *Inclusive Communities* involved allocation of low income housing tax credits in a manner that resulted in a disparate impact on African American residents, promoting their continued residence in segregated, inner city neighborhoods. Citing *Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) and the plurality opinion in *Smith v. City of Jackson,* 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005)*, Inclusive Communities* held that, “antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose.” 135 S. Ct. at 2518.

XIII. Mobile Home Park Evictions

Eviction from a mobile home is governed by Chapter 723 of the Florida Statutes. This chapter applies to eviction from the lot in a mobile home park (MHP), distinct from ownership or rental of the mobile home itself. MHPs offering 10 or more lots for rent come within Chapter 723 and the owner of the mobile home is referred to as the MHP tenant. When both the mobile home and lot are rented or when fewer than 10 lots are available for rent or lease, the tenancy is governed by the provisions of part II of Chapter 83, the “Florida Residential Landlord and Tenant Act.” § 723.002, Fla. Stat.

1. Grounds for Eviction

Pursuant to § 723.061(1), a MHP may evict a tenant, upon appropriate notice, as a result of (1) the tenant’s nonpayment of the lot rental amount; (2) the tenant’s conviction of a violation of a federal or state law or local ordinance, provided the violation is detrimental to the health, safety, or welfare of other residents of the mobile home park; or, (3) violation of a park rule or regulation, the rental agreement, or a provision of Chapter 723.

2. Notice of Termination

The notice requirements vary according to the grounds for eviction. Eviction for nonpayment of lot rent, may be entered only where the default continues for 5 days after delivery of a written demand by the mobile home park owner for payment of the lot rental amount. However, even after the filing of an eviction lawsuit, if the tenant pays the lot rental amount due, including any late charges, court costs, and attorney's fees, the Court may, for good cause, deny the order of eviction, provided such nonpayment has not occurred more than twice. § 723.061(1)(a). This provision would be appear to be applicable only where the tenant has avoided the entry of a default by depositing the accrued rent into the Clerk’s registry and filing a timely Answer to the Complaint.

The MHP is required to furnish the tenant 7 days’ notice for an eviction based upon a violation of the rental agreement, the MHP rules or regulations or Chapter 723, during which time the tenant may cure the noncompliance and avoid eviction. § 723.061(1)(c)1. However, the MHP may terminate the tenancy for a second violation of the same rule or regulation, rental agreement provision, or Chapter 723 within 12 months, if the tenant has been given 30 days written notice specifying the tenant’s actions that caused the violation. § 723.061(1)(c)2.

With respect to the tenant’s conviction for an offense imperiling the MHP, the MHP is required merely to provide 7 days’ notice to vacate premises. § 723.061(1)(b). Similarly, the MHP would not be required to provide an opportunity to cure where the tenant’s violation is determined by the Court to have been an act that endangered the life, health, safety, or property of the park residents or employees or the peaceful enjoyment of the mobile home park by its residents. § 723.061(1)(c)1. Additionally, if a prospective tenant takes possession of a mobile home subject to MHP approval, if that approval is not granted, the tenant may be evicted upon 7 days’ notice of the failure to be approved. § 723.061(1)(e).

3. Eviction by Change of Use

The MHP may evict a tenant without any of the foregoing grounds upon a change of use of the MHP property. Pursuant to § 723.061(1)(d) if the MHP provides 45 days’ notice to the homeowner’s association that the land comprising the mobile home park is being transferred or conveyed in a manner that which change its use from mobile home lot rentals to a different use (e.g. agricultural), the tenants may be subject to eviction.

Under the procedure set forth in § 723.061(1)(d)1, the notice is required to include the notice the price and other terms under which the property is being transferred or conveyed. Unless the homeowner’s association exercises a statutory option to purchase the property, at the price and under the terms and conditions set forth in the notice, the MHP or park owner may evict the tenants upon 6 months’ notice of the projected change in use and of their need to secure other accommodations. § 723.061(1)(d)2. The form of the notice is set forth in § 723.061(1)(d)2.a, and requires advises tenants that they may be entitled to compensation from the mobile home relocation trust funds. The MHP may not increase the lot rental amount within 90 days prior to giving notice of a change of a change of use and homeowners must object to the change in use by petitioning for administrative or judicial remedies within 90 days after the date of the notice. § 723.061(2).

4. Mobile Home Eviction Procedure

a. Service of Process and Summary Procedure. The eviction summons may be posted, similar to a residential eviction under Chapter 83, after two attempts at personal or substitute service at least 6 hour apart. The MHP is entitled to the summary procedure provided in § 51.011, and the Court shall advance the cause on the calendar. § 723.061(3). Except for a change of use notice to the homeowner’s association, the MHP is required to give notice to tenants in writing posted on the premises and sent to tenant, by certified or registered mail, return receipt requested, addressed to tenant at her or his last known address. § 723.061(4). Mailed notices are deemed delivered 5 days after the date of postmark, however, the notice periods would commence upon the notice being posted. § 723.061(4).

b. Deposit of Accrued Rent. MHP tenants served with eviction summons under Chapter 723 are required to answer within 5 days or be subject to default. The tenant’s defense of material noncompliance may be raised only upon 7 days’ notice giving the MHP an opportunity to cure. § 723.063(1). In language similar to § 83.60(2), if the MHP claims unpaid rent, absent a defense of payment or a legally sufficient motion to determine rent, the tenant may be subject to default eviction unless the accrued rent is paid into the Clerk’s registry. § 723.063(2). The failure of the tenant to pay the accrued rent as alleged in the Complaint or as determined by the Court constitutes an absolute waiver of the tenant's defenses other than payment, and the park owner is entitled to an immediate default. § 723.063(2). However, the writ of possession may not issue earlier than 10 days from the date judgment is granted. § 723.062.

The Court has discretion with respect to disbursement of registry funds and may disburse prior to the final hearing based upon actual danger of loss of the premises or other personal hardship resulting from the loss of rental income from the premises. § 723.063(3). Attorney fees are recoverable by the prevailing party in a mobile home eviction case. § 723.068.

XIV. Recreational Vehicle and Transient Occupancy

Tenancy in a Mobile Home Park is distinct from occupancy in a Recreational Vehicle (RV) park. “Mobile home” is defined as a residential structure at least 8 feet wide and 35 feet long that is transportable on an integral chassis and designed for use as a dwelling when connected to the required utilities including e plumbing, heating, air-conditioning, and electrical systems. § 513.01, Fla. Stat. Ann.

1. Recreational Vehicle Occupancy

“Recreational Vehicle” is primarily designed as temporary living quarters for recreational, camping, or travel use, which either has its own motive power or is mounted on or drawn by another vehicle. § 320.01, Fla. Stat. Ann. The term “temporary living quarters” as it relates to vehicles situated in RV parks during the period the vehicle is occupied as living quarters during each year.§ 513.01, Fla. Stat. Ann.

The operator of an RV park may remove any guest who “illegally possesses or deals in a controlled substance as defined in chapter 893 or disturbs the peace and comfort of other persons; who causes harm to the physical park,” or who fails to pay the rent timely. “§ 513.13(1), Fla. Stat.

The procedure for removal from an RV park involves notice, however, without any judicial proceedings, ”Any guest who remains or attempts to remain in such park after being requested to leave is guilty of a misdemeanor of the second degree. . .” § 513.13(2). Paragraph (4) of this Section imposes a duty on law enforcement officer, upon the request of an RV park operator, “to place under arrest and take into custody” any guest who is refuses to leave or otherwise violates the statute in the presence of the officer. Moreover, in contrast to the Landlord Tenant Act the operator of an RV park may “disconnect all utilities of the recreational vehicle” upon nonpayment of three days’ rent . § 513.13(2)

2. Transient Occupancy

“Transient Occupant” is a person whose residence in a dwelling has occurred for a brief period of time, is not subject to a lease and is intended to be transient in nature. § 82.045(1), Fla. Stat., sets forth a collection of factors pertinent to establishing whether a person is a transient occupant. Factors tending to indicate the person is not a transient occupant include having an ownership interest, financial interest, or leasehold interest in the property, having utility subscriptions; and, having a designated space of his or her own. Factors tending to indicate the person is a transient occupant include: not using the property address as an address of record with any governmental agency such as the Department of Highway Safety and Motor Vehicles, not paying rent (excluding minor contributions); not receiving mail at the property, and having a permanent residence elsewhere. § 82.045(1)(a) and (b).

Pursuant to § 82.045(2), upon being directed to leave by a person entitled to possession, a transient occupant unlawfully detains a residential property. § 82.045(3) authorizes a law enforcement officer, upon sworn affidavit of the party entitled to possession, to direct a transient occupant to surrender possession and failure to do so may subject the transient occupant to arrest as a trespasser in violation of § 810.08. The party entitled to possession is not required to notify the transient occupant before filing an action for dispossession. However, if the court finds that, rather than being a transient occupant, the defendant is instead a tenant whose tenancy is required to be terminated in accordance with part II of Chapter 83, the court may not dismiss the action without first allowing the plaintiff to give the defendant the requisite notice required and to amend the Complaint to proceed under that part. § 82.045(4).

XV. Defenses to Eviction

The tenant may raise defenses to an eviction claim including challenges to the validity of the lease such as the application of rule against perpetuities and the state of frauds, as well as the defenses of payment, waiver, material non-compliance, and retaliatory eviction. All of these defenses, except for the defense of payment, require deposit of the accrued rent in the registry of the court before they may be raised.

A. Validity of the Lease. A challenge to the existence or the validity of the lease does not necessarily import a challenge to the court’s jurisdiction. For example, the complaint may allege the existence of a written lease where the parties had only a month-to-month tenancy. The application of § 83.60(2) would appear to require the deposit of the accrued rent to raise this defense.

While a lease may be rescinded for fraud relating to an existing fact, as a general rule, rescission will not be granted for failure to perform a covenant or promise to do an act in the future, unless the covenant breached is a dependent one. AVVA-BC, LLC v. Amiel, 25 So. 3d 7 (Fla. 3d DCA 2009).

Turner v. Florida State Fair Authority, 974 So. 2d 470 (Fla. DCA 2008) distinguished between a license and a lease, holding that a license does not confer an interest in the land but merely gives the licensee the authority to do a particular act on another's land.

1. Rule Against Perpetuities.

Leases in perpetuity are universally disfavored, thus the courts are loath to construe a right to renewal as perpetual, and will not do so unless the language of the agreement clearly and unambiguously compels them to do so. Chessmasters, Inc. v. Chamoun, 948 So. 2d 985 (Fla. 4th DCA 2007).

2. Statute of Frauds § 689.01, Fla. Stat.

Lease must comply with § 689.01 which requires any lease for a term of more than one year to be in writing, signed in the presence of two subscribing witnesses except for conveyances by corporations. Skylake Ins. Agency, Inc. v. NMB Plaza, LLC, 23 So. 3d 175 (Fla. 3d DCA 2009). Estoppel may be used to preclude a party from advancing the Statute of Frauds defense where that party to the lease has accepted benefits under the lease, either rent or possession, and otherwise performs as though lease is valid. Where a party has performed as though the lease was valid, in equity they ought not to be permitted to disavow it. S & I Investments v. Payless Flea Market, Inc., 36 So.3d 909 (Fla. 4th DCA 2010).

B. Sale of Premises. The owner’s right to receive rent may be extinguished by sale of premises if the current owner purchased land as bona fide purchasers for value without notice under recording statute. Harkless v. Laubhan, 42 Fla. L. Weekly D15 (Fla. 2d DCA Dec. 21, 2016).

C. Waiver.

In accordance with § 83.56, Fla. Stat., except as provided in the recent statutory amendment, if either LL accepts rent with actual knowledge of a noncompliance by T or if T pays rent with actual knowledge of a noncompliance by LL, that party waives his or her right to terminate the rental agreement or to bring a civil action for that noncompliance, but not for any subsequent or continuing noncompliance.

Bodden v. Carbonell, 354 So. 2d 927 (Fla. 2d DCA 1978) holding that a LL’s acceptance of past due rent with knowledge of T’s breach of lease by nonpayment constitutes waiver of LL’s right to proceed with eviction for nonpayment.

Pursuant to Chapter 2013-136 of the Laws of Florida, effective July 1, 2013, subsection (5) of section 83.56, Florida Statutes, is amended to read:

83.56 Termination of rental agreement –

(5)(a) . . . However, a landlord does not waive the right to terminate the rental agreement or to bring a civil action for that noncompliance by accepting partial rent for the period. If partial rent is accepted after posting the notice for nonpayment, the landlord must:

1. Provide the tenant with a receipt stating the date and amount received and the agreed upon date and balance of rent due before filing an action for possession;

2. Place the amount of partial rent accepted from the tenant in the registry of the court upon filing the action for possession; or

3. Post a new 3-day notice reflecting the new amount due.

Under very limited circumstances a landlord is permitted to accept partial payment of overdue rent and continue with the eviction action. As an exception to the waiver provisions of section § 83.56 it would appear to be incumbent on LL to demonstrate compliance with the receipt, deposit, and notice requirements necessary to avoid waiver.

2. LL may accept partial rent & evict T if parties agreed there is no waiver. Philpot v. Bouchelle, Jr., 411 So. 2d 1341 (Fla. 1st DCA 1982). Where lease option to purchase contract expressly provided that acceptance of late performance by lessor would not constitute a waiver of lessor’s rights, lessor’s acceptance of lessee’s late payments did not constitute waiver. Id.

3. Pattern of late rent payments could alter time period necessary to pay rent even with an anti-waiver clause. Protean Investors Inc. v. Travel Etc. Inc., 499 So. 2d 49 (Fla. 3d DCA 1986). Court found that Philpot, *supra*, was not controlling because LL in Philpot accepted the late rental payments under protest and notified T of this.

4. LL estopped to claim breach where LL failed to respond to T’s request to be notified if LL did not agree to proposed termination of lease. Harbor House Partners, Ltd., v. Mitchell, 512 So. 2d 242 (Fla. 3d DCA 1987).

Pursuant to Chapter 2013-136 of the Laws of Florida, effective July 1, 2013, subsection (1) of section 83.56(5)(b), Florida Statutes, is amended to read:

83.56 Termination of rental agreement.—

(5)(b) . . . This subsection does not apply to that portion of rent subsidies received from a local, state, or national government or an agency of local, state, or national government; however, waiver will occur if an action has not been instituted within 45 days after the landlord obtains actual knowledge of the noncompliance.

This amendment relates to the public housing landlord’s receipt of the government subsidized portion of the rent where the balance of the rent is unpaid or T is otherwise subject to eviction. Receipt of that portion does not waive the eviction claim, except when LL fails to commence an eviction action within 45 days of acquiring actual knowledge of the non-payment or other action that entitles LL to eviction.

D. Material Noncompliance.

In accordance with §§ 83.60(1) and 83.56(5), Fla. Stat., the material non-compliance with LL’s obligations under the lease, under applicable statutes, or under § 83.51(1), Fla. Stat., is defense to non-payment of rent. Therefore, T may properly withhold rent if LL has committed material non-compliance with the terms of the lease, however T would be required to deposit the accrued rent as alleged in the complaint or as determined by the court.

Upon determining that that LL is in material non-compliance with LL’s obligations under the lease, the court may grant relief to T including termination of the lease and/or reduction of the rent. In order for T to raise the defense of material non-compliance,

1. T is required to deliver written notice to LL before the rent is due stating LL’s material non-compliance and T’s intention not to pay if any material violations not corrected within 7 days. Notice needs to be sent prior to 3 day notice otherwise defense of material noncompliance cannot be raised. Lakeway Management Company of Florida, Inc. v. Stolowilsky, 527 So. 2d 950 (Fla. 3d DCA 1988). The recent amendment to § 83.60(1)(a) does not apply to permit T to file the notice late or during the pendency of the proceedings.

2. In addition to being a complete defense to non-payment of rent, the fact finder shall determine the amount, if any, by which the rent is to be reduced to reflect the diminution in value of the dwelling unit during the period of non-compliance with § 83.51(1), Fla. Stat.

3. T is not entitled merely to make repairs and deduct the cost from the rent unless expressed in lease.

4. If LL’s failure to comply renders the dwelling unit uninhabitable and T vacates, T shall not be liable for rent during the period the dwelling unit remains uninhabitable. Ralston, Inc. v. Miller, 357 So. 2d 1066 (Fla. 3d DCA 1978); Berwick v. Kleinginna Investment Corp., 143 So. 2d 684 (Fla. 3d DCA 1962).

5. If LL’s failure to comply does not render the dwelling unit uninhabitable and T remains in occupancy, the rent for the period of non-compliance shall be reduced by an amount in proportion to the loss of rental value caused by the non-compliance.

E. Constructive Eviction

Although not referenced in the Landlord Tenant Law, constructive eviction has been identified as a defense to eviction as well as giving rise to a cause of action. The Florida Supreme Court recognized and defined the constructive eviction defense in [Hankins v. Smith*,* 138 So. 494, 495–96 (1931)](http://web2.westlaw.com/find/default.wl?mt=Florida&db=734&rs=WLW14.01&tc=-1&rp=%2ffind%2fdefault.wl&findtype=Y&ordoc=2028964105&serialnum=1932110807&vr=2.0&fn=_top&sv=Split&tf=-1&referencepositiontype=S&pbc=4C1D4660&referenceposition=495&utid=1) as improper action by LL that renders the premises, “unsafe, unfit, or unsuitable for occupancy in whole, or in substantial part, for the purposes for which they were leased.” However, this defense is essentially an extreme form of material non-compliance and is subject to the same notice requirement as set forth in § 83.56(1), Fla. Stat. Plakhov v. Serova, --- So.3d ----, 2012 WL 5232231, 37 Fla. L. Weekly D2520 (Fla.App. 4 Dist. Oct 24, 2012).

F. Retaliatory Eviction.

T has a defense of retaliatory eviction pursuant to §83.64, Fla. Stat. LL cannot retaliate against T by discriminatorily increasing the T’s rent, decreasing services to the T, or threaten to bring an action for possession or other civil action.

Examples of retaliatory conduct include:

1. T has complained to a government agency charged with responsibility for enforcement of a building, housing, or health code of a suspected violation applicable to the premises;

2. T has organized, encouraged or participated in a tenants’ organization; or

3. T has complained to LL pursuant to § 83.56(1), Fla. Stat.

Pursuant to Chapter 2013-136 of the Laws of Florida, effective July 1, 2013, §83.64 is amended to reads as follows:

83.64. Retaliatory conduct –

(1)(e) The tenant has paid rent to a condominium, cooperative, or homeowners’ association after demand from the association in order to pay the landlord’s obligation to the association; or

(1)(f) The tenant has exercised his or her rights under local, state, or federal fair housing laws.

Under the amendment, retaliatory eviction explicitly includes T’s payment of accrued rent to the condominium or homeowner’s association pursuant to their demand – even if the demand was improper or erroneous. This amendment also clarifies that eviction may not be based on tenant complaints to governmental authorities even if not factually justified, where T was exercising a legal right to lodge the complaint.

Evidence of retaliatory conduct may be raised by T as a defense in any action brought against him or her for possession. Example: If LL sued to evict for non-payment of rent and T was withholding for failure of LL to comply with housing codes, T could defend by raising § 83.60(1) or § 83.64(2), Fla. Stat. T has initial burden of proof that LL’s primary reason for eviction is retaliatory. Burden shifts to LL to prove that eviction is based on good cause which include but are not limited to non-payment of rent, violation of lease or rules, or violation of statute.

XVI. Final Judgments and Writs of Possession

The final judgment should direct the clerk of courts to issue a writ of possession. Fla. R. Civ. P.1.580(a). The writ of possession describes the real property in question, and directs the sheriff to take the property into his or her possession.

Pursuant to Chapter 2013-136 of the Laws of Florida, effective July 1, 2013, subsection (1) of section 83.62, Florida Statutes, is amended to read:

83.62 Restoration of possession to landlord.—

(1) In an action for possession, after entry of judgment in favor of the landlord, the clerk shall issue a writ to the sheriff describing the premises and commanding the sheriff to put the landlord in possession after 24 hours’ notice conspicuously posted on the premises. Saturdays, Sundays, and legal holidays do not stay the 24-hour notice period.

This amendment clarifies that weekends and holidays do not stay the 24 hour notice period for the sheriff’s eviction. This appears to permit eviction on a Saturday, Sunday, or holiday based upon a notice posted the previous day.

A. Any time after the writ of possession is executed, the owner may also remove the personal property of T. § 83.62(2), Fla. Stat. Additionally, the owner may change the locks on the doors at the time the writ of possession is executed. Id.

B. Settlement stipulations.

1. Stipulations generally.

Stipulations are enforced in the same manner as other contracts. Federal Home Loan Mortgage Corp. v. Molko, 602 So. 2d 983 (Fla. 3d DCA 1992). Unconscionable and repugnant contracts, i.e., “stipulations” may remain unenforced, Krez v. Sun Bank/South Florida, N.A., 608 So. 2d 892 (Fla. 4th DCA 1992).

2. Landlord/tenant stipulations.

The courts may properly refuse to enforce unconscionable provisions of rental agreement. § 83.45, Fla. Stat., and some judges have required the 3-day notice to be included in pay-and-stay stipulations.

Legakis v. Loumpos,40 So.3d 901 (Fla. 2 DCA 2010) held that where settlement provided that landlord would repair air conditioning unit, Court could not award tenant costs without committing such funds to repair.

3. Knowing waiver.

A tenant may knowingly waive constitutional or statutory rights to which he or she is entitled, provided no public policy is violated. Gilman v. Butzloff, 22 So. 2d 263 (Fla. 1945); Weinberger v. Board of Public Instruction of St. Johns County, 112 So. 253 (Fla. 1927).

C. Motions to Stay

Following a judgment of eviction, county courts routinely receive motions to stay the execution of the writ of possession. The consideration of any such motion should accord with the language of § 83.60(2), Fla. Stat., to the effect that absent deposit of the accrued rent, except for the defense of payment, “The landlord is entitled to an immediate default judgment for removal of the tenant with a writ of possession to issue without further notice or hearing thereon.” Consistent with this provision, deposit of the accrued rent or payment of the overdue rent would appear to be required before the court may properly consider the merits of a motion to stay.

XVII. Appeals and Stays Pending Appeal

An appeal may be taken by either party from the final judgment or from an (interlocutory) non-final order. If an appeal is taken from a non-final order (such as an order disposing of a motion to determine rent), pursuant to Rule 9.130, Fla. R. App. Proc., the court is divested of jurisdiction to enter a final judgment. Rule 9.130(f) states that in the absence of a stay, “[d]uring the pendency of a review of a non-final order. . . the lower tribunal may not render a final order disposing of the cause pending such review.” An appeal from the final judgment must be commenced within thirty days of the final judgment. § 51.011(5), Fla. Stat; Sheradsky v. Basadre, 452 So. 2d 599 (Fla. 3d DCA 1984). Tenants who wish to remain in possession must file both an appeal and a motion to stay.

A. Staying the writ. Granting a stay of the writ of possession pending appeal is within the discretion of the court. See, REWJB Gas Investments v. Land O'Sun Realty, Ltd., 645 So.2d 1055, (Fla. 4th DCA 1994) holding that the trial court abused its discretion by denying tenant’s request for a stay of an eviction judgment as a result of the potential for inconsistent rulings in different pending lawsuits. In addition to judicial economy and the potential for inconsistent rulings, the court exercising discretion to grant or deny a stay should consider the potential of irreparable harm to T and/or LL and whether a substantial question is raised on appeal.

B. Posting bond. Any stay issued to a tenant appealing from a final judgment of eviction should be conditioned upon T posting a bond. The bond may contain conditions the court deems appropriate and should be in an amount sufficient for the payment of costs interest, damages for delay, use or depreciation of the property. Fla. R. App. P. 9.310(c)(2). The bond’s main purpose is to protect the prevailing party. City of Plant City v. Mann, 400 So. 2d 952 (Fla. 1981). The bond must be reasonably related to the appeal. Cerrito v. Kovitch, 406 So. 2d 125 (Fla. 4th DCA 1981). A prevailing party’s award of attorney’s fees pursuant to the final judgment may not be collected by the court as part of the bond. Coral Gables v. Geary, 398 So. 2d 479 (Fla. 3d DCA 1981).

C. Appeal without stay. T still has a right to an appeal, even where T is not able to post bond and LL regains possession of the premises. Ruby Mountain Construction & Development Corp. v. Raymond, 409 So. 2d 525 (Fla. 5th DCA 1982); Palm Beach Heights Development & Sales v. Decillis, 385 So. 2d 1170 (Fla. 3d DCA 1980).

XVIII. Security Deposits

The subject of security deposits was addressed by recent amendments to Landlord Tenant Act. Security deposits are required to be retained by LL or LL’s successor. Upon termination of the lease, the Act sets forth a procedure by which LL and T are to provide notices with respect to the claims on the security deposit. Conditioning any entitlement to the security deposit on timely notice is designed to promote prompt disposition of the security deposit without the necessity of litigation.

Pursuant to Chapter 2013-136 of the Laws of Florida, effective July 1, 2013, subsections (2) and (7) of section 83.49, Florida Statutes, are amended to read:

83.49 Deposit money or advance rent; duty of landlord and tenant.—

(2) The landlord shall, in the lease agreement or within 30 days after of receipt of advance rent or a security deposit, give written notice the tenant which [shall]. . .

(d) Contain the following disclosure:

. . . IF YOU DO NOT REPLY TO LL STATING YOUR OBJECTION TO THE CLAIM [ON THE SECURITY DEPOSIT] WITHIN 15 DAYS AFTER RECEIPT OF LL’S NOTICE, LL WILL COLLECT THE CLAIM AND MUST MAIL YOU THE REMAINING DEPOSIT, IF ANY. . .

Applicable to landlords who rent more than 5 units, this amendment requires disclosure in or contemporaneous with the lease advising T of the requirement to object to LL’s retention of the security deposit. The disclosure addresses T’s forwarding address, time frame for return of LL’s claim on the security deposit and T’s objection, the forfeiture of the entitlement to the security deposit upon failure to comply, and the ability to file a lawsuit for damages despite forfeiture. The disclosure is required for all leases entered into after January 1, 2014. While nonpayment of the rent is not justified by non-compliance with this provision, it is unclear whether LL is precluded from the security deposit if the disclosure is not made.

(7) . . . [T]here is a rebuttable presumption that any new owner or agent received the security deposit from the previous owner or agent; however, this presumption is limited to 1 month’s rent. . . .

The new owner may avoid responsibility for the security deposit upon showing it was not transferred by the prior owner. However, the amendment establishes a rebuttable presumption that the new owner received and is liable for a security deposit limited to 1 month’s rent.

A. § 83.49(3)(a), Fla. Stat., sets forth notification requirements when T vacates the premises or upon termination of a written lease:

1. LL has 30 days to return security deposit with interest or to give T notice of LL’s intent to impose a claim against the security deposit.

2. Notice must:

(a) Be sent by certified mail to “the tenant's last known mailing address.” If notice not sent by certified mail and T claims he did not get notice then notice may be deemed fatally defective.

Some County Court decisions have required strict compliance with the mailing requirement while others have held that, regardless of compliance, actual notice is sufficient. Consistent with statutory intent, actual notice may be sufficient provided that the tenant did not refrain from objecting in reliance on compliance with the certified mail requirement.

If tenant does not give forwarding address LL must still send notice to last known address (the address of rented premises).

(b) State LL’s intention to impose a claim against the security deposit.

(c) State reason why claim is being imposed.

(d) State amount LL is claiming.

(e) Give T 15 days to object in writing.

(f) State LL’s address.

3. It appears the notice is not required to state every item replaced or repaired, but may state generally the damages to which the security deposit is being applied, although they may be required to be more specifically proven at trial. However, if the Court finds that the notice was defective or not timely the tenant is not required to send an objection in response to the notice.

4. If LL does not send notice, LL forfeits right to security deposit no matter how much damage T has caused. Durene v. Alcime, 448 So. 2d 1208 (Fla. 3d DCA 1984); § 83.49(2)(a), Fla. Stat.

5. If T does not object to notice, then LL keeps amount claimed and must return remainder within 30 days.

6. If LL fails to escrow deposit, LL does not forfeit security deposit.

7. If T vacates before the expiration of the lease then, absent contrary lease provisions, T must give written notice to LL that he is vacating by certified mail or hand delivery at least 7 days before vacating; and inform LL of new address.§ 83.49(5), Fla. Stat.

8. § 83.49(5) excuses the notice requirement of § 83.49(3)(a) when the T vacates early or abandons the premises and fails, within 7 days, to provide the LL with notice of an, “address where the tenant may be reached.” Failure to give the notice timely, “shall relieve the landlord of the notice requirement of paragraph (3)(a) but shall not waive any right the tenant may have to the security deposit or any part of it.”Therefore, where T’s failure to give notice does not forfeit T’s right to security deposit; T would have to institute an action for return of the security deposit.

9. § 83.50, Fla. Stat., requires disclosure of, “the name and address of the landlord or a person authorized to receive notices and demands,” on behalf of the LL. In the event the LL has failed to make this disclosure or the LL’s address has changed from that in the lease, furnishing T’s forwarding address to the LL’s address in the lease appears sufficient to require LL to furnish the notice of applying the security deposit to the T’s new address.

10. There a 30 day limit on LL claims upon the security deposit but not on all LL claims for damages. LL must return the security deposit but can file an independent action for damages. If a tenant files a claim for return of the security deposit and prevails, the security deposit may not be used for purposes of a set-off. Durene v. Alcime, 448 So. 2d 1208 (Fla. 3d DCA 1984).

11 If tenant prevails on complaint for security deposit, but LL prevails on counterclaim for damages, tenant is entitled to attorney fees. § 83.49, Fla. Stat.

12. Security deposit can be used for back rent if not prohibited by lease.

XIX. Landlord’s Duties/Prohibited Practices

§ 83.51, Fla. Stat., sets forth certain responsibilities of LL that may not be waived in the lease. Basically, LL has a duty to inspect and maintain premises in order to provide a habitable dwelling. Failure to comply with the duties under this section may give rise to a defense of material non-compliance as provided in 83.60, Fla. Stat.

A. Warranty of Habitability.

Consistent with LL’s statutory duty to maintain the premises as set forth in § 83.51, LL has a duty reasonably inspect premises before allowing T to take possession and make repairs necessary to transfer a reasonably safe dwelling unit fit for human habitation. The duty of LL to repair dangerous defective conditions upon notice of their existence continues after T takes possession. Mansur v. Eubanks, 401 So.2d 1328 (Fla. 1981).

B. Code Compliance.

Pursuant to § 83.51 LL is required to maintain the premises in a manner that complies with applicable building, housing, and health codes and where there are no applicable building, housing, or health codes, LL is required to maintain the roofs, windows, screens, doors, floors, steps, porches, exterior walls, foundations, and all other structural components in good repair and capable of resisting normal forces and loads and the plumbing in reasonable working condition.

Pursuant to Chapter 2013-136 of the Laws of Florida, effective July 1, 2013, section 83.51 is amended to add the following language:

83.51 Landlord's obligation to maintain premises –

(1)(b) The landlord, at commencement of the tenancy, must ensure that screens are installed in a reasonable condition. Thereafter, the landlord must repair damage to screens once annually, when necessary, until termination of the rental agreement

This amendment requires LL to install and maintain screens.

Pursuant to Chapter 2013-136 of the Laws of Florida, effective July 1, 2013, section 83.50 is amended to delete the following language:

83.50 Disclosure of landlord's address –

(2) LL or LL’s authorized representative, upon completion of construction of a building exceeding three stories in height and containing dwelling units, shall disclose to the tenants initially moving into the building the availability or lack of availability of fire protection.

The deletion of this language appears to preclude T from seeking termination or claiming a breach of the lease as a result of the non-disclosure of fire protection.

C. Notice of Defects.

LL must however have notice of defects that occur in the premises after T takes possession. See, Tolles v. Garcia, 694 So. 2d 94 (Fla. 3d DCA 1997), for notice in the context of determining LL’s liability to a guest of T for a dangerous condition of the premises.

1. LL has right to enter premises. § 83.53, Fla. Stat. However, the right of entry has limitations:

(a) LL may enter to inspect the premises to make necessary or agreed repairs, decorations, alterations, or improvements, supply agreed services, or exhibit the dwelling to prospective or actual purchasers, mortgages, tenant workers, or contractors. T shall not unreasonably withhold consent for the above.

(b) LL may only enter:

(1) With the consent of T.

(2) In case of emergency.

(3) When T unreasonably withholds consent.

(4) If T is absent from the premises for a period of time equal to one-half the time for periodic rental payments. If the rent is current and T notifies LL of an intended absence, then LL may enter only with the consent of T or for the protection or preservation of the premises. LL may be held liable for actual and consequential damages, or three months rent, whichever was greater and attorney’s fees resulting from lockout of tenant where abandonment not established.

(c) LL may enter dwelling unit at any time for protection or reservation of premises. LL may enter the dwelling unit upon reasonable notice to T and at a reasonable time for the purpose of repair of the premises. Reasonable notice for the purpose of repairs is notice given at least 12 hours prior to entry. Reasonable time for the repair shall be between the hours of 7:30 a.m. and 8:00 p.m. § 83.53(2), Fla. Stat.

2. LL prohibited by § 83.67, Fla. Stat., from self-help; LL cannot:

(a) Cause directly or indirectly the termination or interruption of any utility service furnished T. Includes: utilities under the control of or paid by LL. Examples of utilities LL may not terminate include; heat, gas, water, electricity, garbage collection, and refrigeration. § 83.67(1), Fla. Stat. But see, Badaraco v. Suncoast Towers V Associates, 676 So. 2d 502 (Fla. 3d DCA 1996) which held that, in accord with legislative intent, T could not recover statutory damages where LL’s temporary interruption of water and elevator services was due to LL’s general repairs and renovations to convert rental building into condominiums and were not self-help or to evict.

(b) Change locks or use any boot-lock or similar device.

(c) Remove outside doors, locks roof, walls, or windows except for maintenance, repair etc.

(d) Remove personal property except after surrender, abandonment or a lawful eviction.

C. The Tenant’s Remedies

In addition to termination of the lease and as a defense to a claim for eviction for nonpayment of rent, (see, IX. Defenses to Eviction, *supra*) LL engaging in prohibited self-help may give rise to a cause of action for damages.

1. LL is liable for actual and consequential damages or 3 months rent, whichever is greater, and costs, including attorney fees.

2. Subsequent or repeated violations, which are not contemporaneous with the initial violation, shall be subject to separate awards of damages.

3. Punitive damages for self-help may be available if T can show self-help was done with fraud, actual malice, or deliberate violence or oppression, or when LL acts willfully or with such gross negligence as to indicate a wanton disregard of rights of others.

XX. Termination by Member of the Armed Services

1. Pursuant to § 83.682, Fla. Stat., any service member may terminate his or her rental agreement upon 30 days’ notice if T is:
2. ordered to move 35 miles or more from the location of the rental premises, provided such orders are for a period of at least 60 days;
3. prematurely or involuntarily discharged from active duty
4. required to move into government quarters
5. The notice is required to be a copy of the orders or verification from the commanding officer
6. The rent is prorated for the notice period but the service member is not liable for liquidated or other damages due to early termination

XXI. Cause of Action For Damages

In accordance with § 83.55, Fla. Stat, if either LL or T fails to comply with the requirements of the rental agreement or this part, the aggrieved party may recover the damages caused by the non-compliance.

Pursuant to Chapter 2013-136 of the Laws of Florida, effective July 1, 2013, section 83.54 is amended to reads as follows:

83.54 Enforcement of rights and duties; civil action; criminal offenses –

Any right or duty declared in this part is enforceable by civil action. A right or duty enforced by civil action under this section does not preclude prosecution for a criminal offense related to the lease or leased property.

The change clarifies that a criminal prosecution including, without limitation, a charge of criminal mischief, may be lodged as a result of violation by landlords and tenants. It may also permit a landlord or tenant to threaten the other party with such prosecution without being committing actionable extortion.

A. Service and Pleading Requirements

1. Complaint must seek damages. See, Antoniadis v. Earca, N.U., 442 So. 2d 1001 (Fla. 3d DCA 1983). Or issue may be tried by implied consent if no unfair prejudice created thereby. Smith v. Mogelvang, 432 So. 2d 119 (Fla. 2d DCA 1983).

a. But see, § 83.61, Fla. Stat., suggesting damages may arise from possession claim and § 83.625, Fla. Stat., requiring compliance with the Florida Rules of Civil Procedure. Florida Rule of Civil Procedure 1.110(b) requires, “a demand for judgment for the relief to which the pleader deems himself or herself entitled.”

2. Must have proper summons. 5-day vs. 20 day summons. See, Stein v. Hubbs, 439 So. 2d 1005 (Fla. 5th DCA 1983) (approving 5-day summons for damage claim and order to the contrary based upon more recent statutory language). Combination 5-day/20 day summons.

B. Must have proper service.

1. § 83.625, Fla. Stat. If answer is filed denying debt, landlord may proceed on damages claim depending on whether complaint asks:

(a) only for possession;

(b) for damages, but only 5-day summons is served;

(c) for damages, but service is by posting.

2. Default may be appropriate if proper service is effected and answer relates to possession claim only.

C. Landlord’s damages.

1. A default judgment can be entered on liquidated damages without further proof of damages. *See Paramo v. Floyd,* 154 So.3d 477, 478 (Fla. 2d DCA 2015). But a hearing is required on claims for unliquidated damages even where a party has been defaulted. In an eviction/damages case the amount was not liquidated because it was “not based upon an arithmetically certain calculation or the application of definite rules of law.” Charlotte Harbor Properties Associates, Ltd. v. Huff, 632 So.2d 229 (Fla. 2d DCA 1994). Maggiano v. Whiskey Creek Prof'l Ctr., LLC, 160 So. 3d 535, 536–37 (Fla. 2d DCA 2015).

2. Rent disbursed from the registry, §§ 83.61 and 83.625,

Fla. Stat. § 83.61, Fla. Stat., permits LL to apply to the court for disbursement of funds or for prompt final hearing if LL proves danger of loss of premises or other personal hardship resulting from the loss of rental income. Court may award all or any portion of funds to LL or may proceed to final resolution.

However, Noimbie v. Harvey, 137 So. 3d 606 (Fla. 4th DCA 2014) held that the County court lacked jurisdiction, after dismissal of LL’ss eviction action against T due to insufficiency of the three-day notice, to award LL a portion of the funds deposited in the court registry. Upon dismissal of the action, T's obligation to post rent evaporated and T became entitled to return of the funds deposited.

3. Unpaid rent - choice of remedies after possession - § 83.595, Fla. Stat.

a. retake possession for self and end tenant’s liability;

b. retake possession for tenant and try to relet – § 83.595 (2), Fla. Stat., requires good faith effort to relet, but does not require landlord to give preference over other vacant units.

c. do nothing - tenant liability as rent comes due.

4. Acceleration clauses in leases are enforceable. However, they only relate to the accrual of the right to bring suit for rent due in the future. They do not affect the actual measure of damages for breach of the lease. Jimmy Hall’s Morningside, Inc., v. Blackburn and Peck Ent., 235 So. 2d 344 (Fla. 2d DCA 1970).

5. Holdover tenancy - § 83.58, Fla. Stat.

a. Not applicable if eviction is for non-payment (therefore, cannot use standard 3-day notice) Casavan v. Land-O-Lakes Realty, Inc., 542 So. 2d 371 (Fla. 5th DCA 1989).

b. May recover double rent (discretionary). Holdovers based upon justiciable issues will ordinarily not result in double rent even when landlord ultimately prevails. Greentree Amusement Arcade, Inc. v. Greenacres Development Corp., 401 So. 2d 915 (Fla. 4th DCA 1981). Covelli Family, L.P. v. ABG5, L.L.C., 977 So. 2d 749 (Fla. 4th DCA 2008) held that holdover liability not appropriate where the validity of the termination remained a genuine and justiciable issue.

6. Waste or damage to property

a. May or may not be covered by security deposit.

b. Even if landlord fails to file proper notice required by statute he or she may still pursue independent damage claim.

c. Should be treated like any other claim for damages.

7. Distress for rent - Landlord’s lien

a. Fla. Stat. § 713.691(3) creates LL lien but abolishes distress for rent for residential tenancies. It is permitted only for non-residential tenancies, Goodman v. Brasseria La Capannina, Inc., 602 So. 2d 1245 (Fla. 1992).

b. Lien attaches only after sheriff delivers possession to landlord. A premature attempt can lead to a tenant’s claim for damages pursuant § 83.67, Fla. Stat.

D. Tenant’s damages

1. Prohibited self-help § 83.67. See, XV. Landlord’s Duties/Prohibited Practices, supra.

2. Casualty damage - § 83.63, Fla. Stat.

a. Percentage reduction based upon condition of property

(1) Cannot be caused by tenant.

.(2) Substantial impairment of enjoyment is required for termination.

(3) Determining factor is “fair rental value.”

(4) Tenant need not send a written notice if LL knew or should have known of problem. Zais v. C.F. West Florida, Inc., 505 So. 2d 577 (Fla. 4th DCA 1987).

b. But see, § 83.56(5), Fla. Stat., which suggests that tenant waives right to claim casualty damage by full payment of rent.

3. Tenant may claim moving expenses and/or extra housing costs as part of damage claim pursuant to § 83.63 or § 83.67, Fla. Stat.

4. Retaliatory eviction - § 83.64, Fla. Stat.

Created by statute as a defense to possession claim. Whether it creates an independent cause of action, see, Crown Diversified Industries, Inc. v. Watt, 415 So.2d 803 (Fla. 4th DCA 1982) and Bethke v. Rissman, 449 So.2d 1009 (Fla. 2d DCA 1984) considering retaliatory eviction cause of action in context of bad faith mobile home park evictions.

5. T’s claim for damages to personal property upon being evicted may be limited by removal of property in accordance with § 83.62, Fla. Stat., and immunity provisions of §§ 715.10-715.111, Fla. Stat., that provide an optional procedure for the disposition of personal property which remains on the premises after a tenancy has terminated or expired and the premises have been vacated by the tenant through eviction, surrender, abandonment, or otherwise.

E. Problem Areas in Determining Damages

Replacement Value

a. Burden of establishing “ordinary wear and tear” reduction is on tenant. Cunningham Drug Stores v. Pentland, 243 So. 2d 169 (Fla. 4th DCA 1970) but it is incumbent upon party seeking damages to present evidence to justify award of damages in definite amount. Smith v. Austin Development Co., 538 So.2d 128 (Fla. 2d DCA 1989).

b. Where damages cannot be precisely determined, trial judge is vested with reasonable discretion in making award of damages. Clearwater Associates v. Hicks Laundry Equipment Corp., 433 So. 2d 7 (Fla. 2d DCA 1983). Court should take advantage of “reasonable discretion” to attempt to place reasonable value on damages.

c. The amount of damages equals the cost of restoration even if LL does not use the money to restore the premises. Pomeranc v. Winn-Dixie Stores, Inc., 598 So. 2d 103 (Fla. 5th DCA 1992).

F. Settlement Agreements

Interpreting commercial lease Tiny Treasures Academy & Get Well Center, Inc. v. Stirling Place, Inc., 916 So. 2d 991 (Fla. 4th DCA 2005) held that where the language of a settlement agreement is clear and unambiguous, trial court may not modify to provide relief to LL omitted from agreement. Landlord may elect and limit remedy in settlement agreement and will not be entitled to additional relief.

G. Prejudgment Interest

Prevailing party is entitled to prejudgment interest. Smith v. Austin Development Co., 538 So. 2d 128 (Fla. 2d DCA 1989) and Argonaut Insurance Co. v. May Plumbing Co., 474 So. 2d 212 (Fla. 1985).

H. Liquidated Damages

1. § 83.595, Fla. Stat., specifically provides for liquidated damages as applied to tenants upon early termination, provided the amount does not exceed 2 months' rent if T is required to give no more than 60 days' notice.

2. This remedy is available only if T accepts the liquidated damages terms at the time the rental agreement was made and indicates acceptance of liquidated damages on the statutory addendum. T is liable for liquidated damages if addendum is executed where the lease omits to reference any particular remedy. Wilson v. Terwillinger, 140 So.3d 1122 (Fla. 5th DCA 2014).

3. In addition to liquidated damages, LL is entitled to the rent and other charges accrued through the end of the month in which LL retakes possession of the dwelling unit and charges for damages to the dwelling unit.

XXII. Attorney’s Fees

Pursuant to § 83.48, Fla. Stat., in an action brought to enforce the provisions of rental agreement or other provisions of Fla. Stat. ch. 83, the prevailing party may recover reasonable court costs, including attorney’s fees from the non-prevailing party.

A. Effect of 2013 Amendment to § 83.48 on Right to Attorney’s Fees

Pursuant to Chapter 2013-136 of the Laws of Florida, effective July 1, 2013, §83.48 is amended to reads as follows:

83.48 Attorney fees.—

In any civil action brought to enforce the provisions of the rental agreement or this part, the party in whose favor a judgment or decree has been rendered may recover reasonable attorney fees and court costs from the nonprevailing party. The right to attorney fees in this section may not be waived in a lease agreement. However, attorney fees may not be awarded under this section in a claim for personal injury damages based on a breach of duty under s. 83.51.

This provision invalidates any lease provision purporting to waive the right to attorney’s fees and precludes an award of attorney’s fees based upon a personal injury claim based upon a breach of LL’s duty under §83.51. The “right to attorney fees” language appears to establish a prevailing party’s entitlement to attorney’s fees, despite the retention of the “may recover” language in the first sentence. It also implies a right to claim damages for personal injuries based upon a failure to comply with LL’s duties under §83.51 to provide a habitable dwelling.

B. Although both §83.48, Fla. Stat., (attorney’s fees for prevailing party generally) and §83.49, Fla. Stat., (attorney’s fees for prevailing party as to security deposit) authorize attorney’s fees to be awarded to the prevailing party, the parties may have prevailed on different issues. In similar circumstances Moritz v. Hoyt Enters., Inc., 604 So.2d 807, 810 (Fla.1992) held that, “[T]he party prevailing on the significant issues in the litigation is the party that should be considered the prevailing party for attorney's fees.”

Animal Wrappers & Doggie Wrappers, Inc. v. Courtyard Distribution Ctr., Inc., 73 So.3d 354, 356 (Fla. 4th DCA 2011) (tenant prevailed against landlord when tenant recovered a portion of its security deposit and, “more importantly,” LL did not prevail on its counterclaim seeking additional damages).

If LL and T claims involve a “common core” of facts and are based on “related legal theories,” a full fee may be awarded to prevailing party unless it can be shown that the attorneys spent a separate and distinct amount of time on counts as to which no attorney's fees were sought. Anglia Jacs & Co., Inc. v. Dubin, 830 So. 2d 169 (Fla. 4th DCA 2002).

Neither party may be held to be prevailing party in cases where resolution resulted from stipulation of parties. Zhang v. D.B.R. Asset Management, Inc., 878 So. 2d 386 (Fla. 3d DCA 2004).

D. Prevailing party in an action for recovery of security deposit is entitled to receive his or her court costs plus a reasonable fee for his or her attorney.

Gaccione v. Damiano,35 So.3d 1008 (Fla. 5 DCA 2010) held that where lease was silent as to attorney fees prevailing tenant not precluded from seeking attorney fees under landlord-tenant statute. If T recovers any portion of the security deposit he/she will be considered the prevailing party. Malagon v. Solari, 566 So. 2d 352 (Fla. 4th DCA 1990).

E. Multiplier may be awarded in landlord/tenant cases. Meli Investment Corp. v. O.R., 621 So. 2d 676 (Fla. 3d DCA 1993). However, competent substantial evidence must exist to support an application of a contingency risk multiplier including the difficulty in securing competent counsel.

Covelli Family, L.P. v. ABG5, L.L.C., 977 So. 2d 749 (Fla. 4th DCA 2008). LL not entitled to multiplier where court focused on the ability to obtain competent counsel. Eckhardt v. 424 Hintze Management, LLC,969 So. 2d 1219 (Fla. 1st DCA 2007).

1. Attorney’s fees are required to be pled with the limited exception of a claim for fees made at the pretrial conference and filed a pretrial statement listing entitlement to fees as an issue to be decided at trial Save on Cleaners of Pembroke II Inc. v. Verde Pines City Center Plaza LLC, 14 So. 3d 295 (Fla. 4th DCA 2009).

XXIII. Bankruptcy

A. 11 U.S.C. § 362: creates an automatic stay and, unless the LL obtains relief from the stay in the Bankruptcy court or the T is discharged from bankruptcy, the LL is prohibited from pursuing eviction by giving any notice terminating the tenancy, filing an eviction action for any reason, or applying any security deposit.

Legal process obtained or orders issued in contravention of stay void, regardless of whether parties had notice of bankruptcy filing. In Re Florida Dairy, Inc., 22 B.R. 197 (Bankr. M.D. Fla. 1982). An attorney who is formally notified of bankruptcy by telephone pursues eviction without contacting the Bankruptcy Court for verification may be held in contempt. In Re Carter*,* 691 F.2d 390 (8th Cir. 1982).

B. The bankruptcy filing may not stay a residential eviction where the LL has obtained a judgment for possession prior to the date a debtor has filed the bankruptcy petition.In Re Aleman, 2013 WL 1694476  (Bankr.M.D.Fla. 2013). The Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) provides an exception to the automatic stay allowing a landlord to complete eviction proceedings on residential property leased to a debtor if the landlord obtained a judgment of eviction prior to the filing of the bankruptcy petition. [11 U.S.C.A. § 362(b)(22)](https://a.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=11USCAS362&originatingDoc=Iec9556368ebb11dbab489133ffb377e0&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).  This exception does not apply unless the judgment has been entered and nothing more than a ministerial execution of the writ of possession is required.

C. The BAPCPA exception will not apply if (1) the debtor can show that an applicable non-bankruptcy law allows for post-judgment cure, (2) the debtor has deposited one month's rent, and (3) the debtor must further certify that he or she has cured the entire prepetition monetary default within 30 days of the petition filing date.

D. Special rules may apply to public housing tenants.  In Re Kelly, 356 B.R. 899, Bankr. L. Rep. 80, 849 (Bankr, S.D. Fla. 2006), held that a public housing T was not required to cure a prepetition default to render the BAPCPA inapplicable.  Kellyheld the debtor/tenant was entitled to remain in her apartment pursuant to the anti-discrimination section of the Bankruptcy Code even if she discharges, rather than cures, her prepetition rent default. [11 U.S.C.A. §§ 362(b)(22), (l)](https://a.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=11USCAS362&originatingDoc=Iec9556368ebb11dbab489133ffb377e0&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), [525(a)](https://a.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=11USCAS525&originatingDoc=Iec9556368ebb11dbab489133ffb377e0&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

XXIV. Case Excerpt

Pro-Art Dental Lab, Inc. v. V-Strategic Group, LLC

986 So. 2d 1244 (Fla. 2008) – *County Court lacked jurisdiction over action filed as ejectment*

The first issue we must confront is whether the county court possessed subject-matter jurisdiction to even consider this ejectment action. We conclude that Florida's county courts lack subject-matter jurisdiction to entertain ejectment actions. Furthermore, we conclude that a county court may not-consistent with due process-vest itself with subject-matter jurisdiction by sua sponte judicially amending an ejectment complaint to state a cause of action under [section 83.21, Florida Statutes (2006)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTS83.21&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31).

In Florida, commercial landlords possess three separate, yet somewhat overlapping, remedies for removing a tenant who holds over after the expiration of a lease. See generally Nicholas C. Glover, *Florida Commercial Landlord Tenant Law* §§ 4.03-.07 (2007 ed.). These remedies are: first, the historic common-law remedy of ejectment, which the Legislature codified in 1967, see ch. 67-254, § 21, Laws of Fla.; [§ 66.021, Fla. Stat](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTS66.021&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31). (2006); second, an unlawful-detainer action under [section 82.04, Florida Statutes (2006)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTS82.04&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31); and finally, a tenant-removal action under [section 83.21, Florida Statutes (2006)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTS83.21&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31). Suffice it to say that while these actions may certainly be similar in some respects, a number of their pleading requirements differ, as may the forum in which the plaintiff is required file the appropriate complaint.

For purposes of this decision, there are two relevant distinctions between these causes of action. First, ejectment actions are subject to the exclusive original jurisdiction of Florida's circuit courts, while county courts generally possess subject-matter jurisdiction in unlawful-detainer and tenant-removal actions (subject to their amount-in-controversy limit). Compare [art. V, § 20(c)(3), Fla. Const](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLCNART5S20&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31)., and [§ 26.012(2)(f), Fla. Stat](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTS26.012&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31). (2006) (vesting circuit courts with exclusive original jurisdiction in ejectment actions), with [§ 34.011(1)-(2), Fla. Stat](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTS34.011&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31). (2006) (vesting county courts with concurrent jurisdiction in tenant-removal actions and exclusive original jurisdiction in unlawful-detainer actions if within the county-court amount-in-controversy limit). Second, the summary procedure of [section 51.011](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTS51.011&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31) applies during an unlawful-detainer or tenant-removal action but does not apply during an ejectment action. Compare [§ 82.04(1), Fla. Stat](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTS82.04&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31). (2006) (stating that [section 51.011](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTS51.011&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31) applies to unlawful-detainer actions), and [§ 83.21, Fla. Stat](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTS83.21&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31). (2006) (stating that [section 51.011](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTS51.011&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31) applies to tenant-removal actions), with ch. 66, Fla. Stat. (2006) (never mentioning [section 51.011](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTS51.011&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31) explicitly or otherwise).

Given the facts of this case, and assuming compliance with the amount-in-controversy requirement, V-Strategic could have filed either an ejectment action in circuit court, an unlawful-detainer action in county court, or a tenant-removal action in county court. See [§§ 26.012(2)(f)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTS26.012&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31), [34.011, Fla. Stat](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTS34.011&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31). (2006); see also [§§ 66.021](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTS66.021&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31) (ejectment), 82.04-.05 (unlawful detainer), 83.20-.21(tenant removal or eviction), Fla. Stat. (2006); Fla. R. Civ. P. Forms 1.940 (ejectment complaint), 1.938 (unlawful-detainer complaint), 1.947 (eviction complaint); [*Bailey v. Bailey*, 114 So.2d 804, 805 (Fla. 1st DCA 1959)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&referencepositiontype=S&serialnum=1959129932&fn=_top&sv=Split&referenceposition=805&pbc=48D2A966&tc=-1&ordoc=2016495081&findtype=Y&db=735&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31) (outlining the elements of an ejectment claim); [*Partridge v. Partridge*, 940 So.2d 611, 613 n. 2 (Fla. 4th DCA 2006)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&referencepositiontype=S&serialnum=2010559933&fn=_top&sv=Split&referenceposition=613&pbc=48D2A966&tc=-1&ordoc=2016495081&findtype=Y&db=735&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31) (substantially similar); *Glover*, *supra* §§ 4.03-.05 (describing ejectment, unlawful detainer, and tenant removal). Notwithstanding its apparent ability to file an unlawful-detainer or tenant-removal claim in county court, V-Strategic did not do so and, instead, specifically designated the claim and filed papers as a suit in “ejectment.”

As the drafter of its complaint, V-Strategic made the conscious decision to seek ejectment, along with a damages claim, in a county court despite the fact that ejectment actions are subject to the exclusive original jurisdiction of Florida's circuit courts. See [art. V, § 20(c)(3), Fla. Const](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLCNART5S20&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31).; [§ 26.012(2)(f), Fla. Stat](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTS26.012&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31). (2006). Pro-Art may challenge the county court's subject-matter jurisdiction at any time, and has chosen to do so at every stage of this litigation. See [Fla. R. Civ. P. 1.140(b), (h)(2)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTRCPR1.140&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31); Philip J. Padovano, *5 West's Fla. Practice Series* § 1.4 (2007-08 ed.) (a party may challenge a court's subject-matter jurisdiction at any time, even on appeal). We take this opportunity to remind civil litigants that “[a] complaint is ... essential to initiate an action.... [I]ts purpose is to invoke the subject matter jurisdiction of the court and to give notice of the claim.” [*Paulucci v. Gen. Dynamics Corp.*, 842 So.2d 797, 800 (Fla.2003)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&referencepositiontype=S&serialnum=2003232712&fn=_top&sv=Split&referenceposition=800&pbc=48D2A966&tc=-1&ordoc=2016495081&findtype=Y&db=735&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31) (*emphasis supplied*) (quoting [*Gen. Dynamics Corp. v. Paulucci*, 797 So.2d 18, 21 (Fla. 5th DCA 2001)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&referencepositiontype=S&serialnum=2001697539&fn=_top&sv=Split&referenceposition=21&pbc=48D2A966&tc=-1&ordoc=2016495081&findtype=Y&db=735&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31), *quashed on other grounds*, [842 So.2d 797 (Fla.2003)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&serialnum=2003232712&fn=_top&sv=Split&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=Y&db=735&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31)). Having specifically and exclusively pled ejectment, V-Strategic and the county court lacked discretion to unilaterally amend the complaint during a hearing on a motion to dismiss in derogation of Pro-Art's substantive rights. *See, e.g.,* [*Lovett v*. *Lovett*, 93 Fla. 611, 112 So. 768, 775-76 (1927)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&referencepositiontype=S&serialnum=1927112303&fn=_top&sv=Split&referenceposition=775&pbc=48D2A966&tc=-1&ordoc=2016495081&findtype=Y&db=734&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31) (“The jurisdiction and power of a court remain at rest until called into action by some suitor; it cannot, by its own action, institute a proceeding sua sponte. The action of a court must be called into exercise by pleading and process, prescribed or recognized by law [.]” (emphasis supplied)); see also [Fla. R. Civ. P. 1.190](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTRCPR1.190&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31) ed. cmt. (“Amendments under paragraph (b) of this rule [“Amendments to Conform with the Evidence”] can be made at any time but they must not prejudice the opposing party.” (*emphasis supplied*)).

“Florida law clearly holds that a trial court lacks jurisdiction to hear and to determine matters which are not the subject of proper pleading and notice,” and “[t]o allow a court to rule on a matter without proper pleadings and notice is violative of a party's due process rights.” [*Carroll & Assocs., P.A. v. Galindo*, 864 So.2d 24, 28-29 (Fla. 3d DCA 2003)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&referencepositiontype=S&serialnum=2003854811&fn=_top&sv=Split&referenceposition=28&pbc=48D2A966&tc=-1&ordoc=2016495081&findtype=Y&db=735&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31) (emphasis supplied) (quoting [In re Estate of Hatcher, 439 So.2d 977, 980 (Fla. 3d DCA 1983)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&referencepositiontype=S&serialnum=1983149280&fn=_top&sv=Split&referenceposition=980&pbc=48D2A966&tc=-1&ordoc=2016495081&findtype=Y&db=735&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31)) (citing [*Epic Metals Corp. v. Samari Lake E. Condo. Ass'n, Inc.*, 547 So.2d 198, 199 (Fla. 3d DCA 1989)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&referencepositiontype=S&serialnum=1989093454&fn=_top&sv=Split&referenceposition=199&pbc=48D2A966&tc=-1&ordoc=2016495081&findtype=Y&db=735&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31); [*Robinson v. Malik*, 135 So.2d 445, 445 (Fla. 3d DCA 1961)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&referencepositiontype=S&serialnum=1962131697&fn=_top&sv=Split&referenceposition=445&pbc=48D2A966&tc=-1&ordoc=2016495081&findtype=Y&db=735&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31)). Pro-Art is thus correct that the county court lacked subject-matter jurisdiction to entertain the ejectment action that V-Strategic specifically sought through its “ejectment” summons and “ejectment” complaint. See [art. V, § 20(c)(3), Fla. Const](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLCNART5S20&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31).; [§ 26.012(2)(f), Fla. Stat](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTS26.012&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31). (2006). As plaintiff, V-Strategic chose its cause of action (ejectment). However, the ejectment complaint was materially deficient because it did not specifically deraign V-Strategic's title dating from the common source of its and Pro-Art's property interests. See [§ 66.021(4), Fla. Stat](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTS66.021&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31). (2006). Additionally, the ejectment judgment was arguably defective because it did not specifically describe the property at issue as required under [section 66.031, Florida Statutes (2006)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=FLSTS66.031&tc=-1&pbc=48D2A966&ordoc=2016495081&findtype=L&db=1000006&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31), and the decision of this Court in [*Florida Coca-Cola Bottling Co. v. Robbins*, 81 So.2d 193, 199-200 (Fla.1955)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&referencepositiontype=S&serialnum=1955115120&fn=_top&sv=Split&referenceposition=199&pbc=48D2A966&tc=-1&ordoc=2016495081&findtype=Y&db=735&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31) (requiring either an accurate metes-and-bounds description or an accurate description based upon the relevant county property records).

XXV. Flowchart

RESIDENTIAL EVICTION PROCEDURES

by Judge Robert W. Lee and updated by Judge David E. Silverman

1. NO RESPONSE FILED/NO RENT TENDERED

→ Plaintiff submits motion for default judgment of eviction?

If NO, no action taken

If YES, Court checks service.

No proof of service – DENY motion without prejudice.

Proof – If no response

If posted, GRANT without costs/fees.[[2]](#footnote-2)

If personal service, GRANT with costs/fees.[[3]](#footnote-3)

1. RESPONSE FILED/NO RENT TENDERED

→ Defendant files motion for rent determination?

IF YES, set motion for hearing if documentation or ambiguity as to amount of rent due.[[4]](#footnote-4)

IF NO, proceed to next arrow.

→Defendant challenges tenancy?

IF YES and claim of right, title or interest in the property, transfer to Circuit Court. [[5]](#footnote-5)

If YES and no claim of right, title or interest in the property, set for tenancy determination hearing.[[6]](#footnote-6)

IF NO, proceed to next arrow.

→Eviction based on non-monetary default?

IF YES, set for landlord/tenant mediation, requiring deposit of accrued to registry.[[7]](#footnote-7)

IF SETTLED, no further action.

IF NOT SETTLED, consider whether to require short pretrial conference,[[8]](#footnote-8)

SET FOR ***TRIAL***.

IF NO, proceed to next arrow.

→Plaintiff submits motion for final judgment of eviction?

If NO, no action taken.

If YES, GRANT, without hearing.[[9]](#footnote-9)

1. RESPONSE FILED/RENT TENDERED

→ Set for landlord/tenant mediation, .

IF SETTLED, no further action.

IF NOT SETTLED, consider whether to require short pretrial conference.[[10]](#footnote-10) SET FOR ***TRIAL***, requiring deposit of accrued rent to registry.

[FOR ALL HEARINGS AND TRIAL PROCEEDINGS, THE COURT IS REQUIRED TO “ADVANCE THE CAUSE ON THE CALENDAR.” Fla. Stat. §83.59(2).]

1. Chart based on: 2010 Census Bureau data; and, E. Ann Carson, Bureau of Justice Statistics, Department of Justice, “Prisoners in 2014.” Chart published at: *Denying Housing Over Criminal Record May Be Discrimination, Feds Say*. Camilla Domonoske. The Two Way: Breaking News From N.P.R. April 6, 2016.

   <http://www.npr.org/sections/thetwo-way/2016/04/04/472878724/denying-housing-over-criminal-record-may-be-discrimination-feds-say>. [↑](#footnote-ref-1)
2. Fla. Stat. §83.625 (“no money judgment shall be entered unless service of process has been effected by personal service”). *See Springbrook Commons, Ltd. v. Brown*, 761 So.2d 1192, 1194 (Fla. 4th DCA 2000) (statute also pertains to an award of costs). [↑](#footnote-ref-2)
3. There is an argument that an award of attorney’s fees is discretionary, not mandatory. *See* Fla. Stat §83.625 (“The prevailing party in the action *may* also be awarded attorneys’ fees and costs.”); *McWhorter v. Consumers Alliance Corp.*, 14 Fla. L. Weekly Supp. 1108 (17th App. Ct. 2007) (use of the word “may” in the statute means an award of fees is discretionary). Costs, however, are mandatory. Fla. Stat. §83.59(4). [↑](#footnote-ref-3)
4. *See Shell v. Foulkes*, 19 So.3d 438, 439 n.4 (Fla. 4th DCA 2009) (*dicta*). [↑](#footnote-ref-4)
5. *See Pro-Art Dental Lab, Inc. v. V-Strategic Group, LLC,* 986 So. 2d 1244 (Fla. 2008) and *Toledo v. Escamilla*, [962 So. 2d 1028, 1030 (Fla. 3d DCA 2007)](http://web2.westlaw.com/find/default.wl?tf=-1&serialnum=2012871072&rs=WLW9.02&referencepositiontype=S&ifm=NotSet&fn=_top&sv=Split&referenceposition=1030&findtype=Y&tc=-1&ordoc=2017771585&db=735&vr=2.0&rp=%2ffind%2fdefault.wl&mt=31). [↑](#footnote-ref-5)
6. *See Minalla v. Equinamics Corp.*, 954 So.2d 645, 648 (Fla. 3d DCA 2007); *Frey v. Livecchi*, 852 So.2d 896, 897-98 (Fla. 4th DCA 2003). [↑](#footnote-ref-6)
7. *See* Fla. Stat. §83.56(5)(b). [↑](#footnote-ref-7)
8. Particularly if parties may have numerous exhibits and witnesses, or if either party demanded a jury trial. *See* Fla. Stat. §51.011(3). [↑](#footnote-ref-8)
9. The response waives any defect in service. *Hager v. Illes*, 431 So.2d 1037, 1038 (Fla. 4th DCA 1983). There is an argument that an award of attorney’s fees is discretionary, not mandatory. See note 2 above. [↑](#footnote-ref-9)
10. Particularly if parties may have numerous exhibits and witnesses, or if either party demanded a jury trial. See note 6 above. [↑](#footnote-ref-10)