

Defaults: Collecting payment deficiency from a guarantor

Most commercial landlords require that the principal owners of the business tenant sign a personal guaranty, which guarantees payment of all sums owed under the lease, including base rent, common area maintenance, and attorneys' fees and court costs. In the event of lease default by the tenant, landlords typically waste no time looking to the personal guarantor for payment of all sums due under the lease for the balance of the leased term. When the guarantor refuses to honor the guaranty obligation, collection of the lease balance becomes necessary.

■ **Reducing deficiency to judgment.** The landlord's first step in the collection process should be to calculate the net balance due to the landlord under the lease for rent and CAM through the end of the lease term. The net balance due may also include repair costs, eviction costs (i.e., court costs and attorneys' fees) and, if permitted under the lease, costs of re-letting the space. The tenant's security deposit would then be credited to arrive at a net balance due. When the balance of the lease term following a default is more than six months to one year, some courts will limit the landlord's judgment to a six-month to one-year period of future rent/CAM due under the lease, and will require the landlord reapply as additional rent/CAM accrue. Usually, the courts do this to avoid entering an excessive judgment that may be capped relatively quickly when the commercial space is re-let. Under Colorado law, a landlord is required to use



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reasonable efforts to re-let the space. Once the space is re-let, the landlord is not entitled to rent/CAM due from that point forward, unless the new lease effectively generates less revenue than would

have been received under the defaulted lease. In that case, the landlord would ordinarily be entitled to the difference.

■ **Post-judgment discovery.** Once the court enters judgment against the guarantor, the landlord must wait at least 14 days before action can be taken to enforce the judgment. However, the landlord can make good use of this time by obtaining a transcript of judgment from the court clerk. After the 14-day stay period, the transcript can be recorded as a lien against any real property owned by the guarantor (recording should be made with the clerk and recorder of the county where the property is located). Some landlords prefer to start the collection process by sending the guarantor a written demand letter, or otherwise engaging the guarantor in direct dialogue to work out a payment plan. When that fails, the landlord has several options, including: 1) commencing a judgment lien foreclosure action (guarantor should have meaningful equity in the real property being foreclosed); 2)

bank and/or wage garnishment; 3) Rule 69 interrogatories; and 4) Rule 69 debtor examination.

Many guarantors do not anticipate a bank garnishment on their personal checking and savings accounts. Because notice does not usually need to be given to the guarantor ahead of time, the landlord's first collection effort should be directed here. However, little may be known of the guarantor's personal assets and finances. In that case, the discovery mechanisms set forth in Rule 69 of the Colorado Rules of Civil Procedure should be utilized. Under Rule 69, the landlord, upon order of the court, can take the deposition of any third party who may have information relevant to property owned by the guarantor. The guarantor also can be served with written interrogatories asking the guarantor to identify all assets and income of the guarantor, including the location of bank accounts. The guarantor also can be served with a subpoena requiring the guarantor appear before the court at a specified time obtained from the court, to answer concerning the guarantor's property. This process is also referred to as a debtor examination. When the guarantor appears in court, he or she is sworn in by the judge. The landlord and guarantor then go to a separate room where the guarantor is asked questions about assets and income. The subpoena to appear also can require the guarantor bring with him to the examination bank statements, tax returns, loan applications and other information that may shed light on the guarantor's

assets and income. This information also serves to keep the guarantor honest at the examination. If the guarantor fails to answer interrogatories, or if the guarantor fails to appear for a debtor examination, a bench warrant may be issued for the guarantor's arrest.

If the landlord discovers income, or other payment or proceeds, due to the guarantor, the landlord has several options: 1) The landlord can serve the person or entity responsible for paying the income or proceeds with a writ of garnishment; 2) If the landlord knows of a third party indebted to the guarantor, or who is holding personal property belonging to the guarantor, under Rule 69, the landlord can subpoena a third party to appear before the court where the party may be ordered to apply such money or property toward satisfaction of the judgment; or 3) The landlord can file a motion asking the court to direct the guarantor to pay the income or proceeds into the court registry to be used to satisfy the judgment. In situations where the judgment is substantial to the landlord, and there is a possibility that the guarantor is hiding assets, or funneling income through another person or entity to keep it from the landlord, the debtor examination should be conducted before a certified court reporter so that there is a written transcript. This transcript becomes useful later when the landlord needs to identify assets and income for the court when requesting the court take some action to obtain that property in satisfaction of the judgment.▲