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PRE-JUDGMENT WRITS OF ATTACHMENT: AN OLD REMEDY FINDS NEW USEFULNESS FOR COMMERCIAL LANDLORDS

Today's difficult commercial real estate environment limits the usefulness of many traditional landlord remedies against commercial tenants who fail to pay their rent or otherwise breach their leases. In many cases, evicting a tenant through an expedited unlawful detainer proceeding merely leaves the landlord with an uncollectable judgment for past rent and damages, plus a vacancy, or another vacancy, at the landlord's property for which it has no replacement tenant.

Alternatively, leaving a tenant in place and just suing for damages for breach of lease allows the tenant to operate rent-free with little pressure to pay what it owes while the case proceeds through litigation. Such litigation is frustrating, expensive, and time-consuming for the landlord, and may result in nothing more than an eventual judgment against a tenant who has dissipated the income received from operating the leased premises in the meantime, and no longer has assets to satisfy the judgment. This latter scenario has been particularly problematical during the past two years, as more defaulting tenants are eventually going out of business, while state and local budget cuts are resulting in significantly longer delays to get non-expedited, non-unlawful detainer, damages cases to trial.

The remedy of a pre-judgment writ of attachment -- or a court order tying up a defendant's assets, including bank accounts and real property until the conclusion of the case -- has long been available under California law. Pre-judgment writs of attachment are a helpful tool in damages suits against tenants. First, a writ of attachment can motivate a tenant who is still in business to agree promptly to a fair financial settlement, because tenants cannot easily or for long tolerate the business disruption caused by having the cash in their attached bank accounts made unavailable and their other attached assets made nontransferable and unusable as collateral for borrowing. Second, a writ of attachment assures a landlord's ability to collect on an eventual judgment by preserving the attached property so that it is available to be levied against to satisfy the judgment.

A pre-judgment writ of attachment is generally available if the following four criteria are all satisfied. First, the action must involve a claim for money upon an express or implied contract, such as a lease. Second, the total amount of the claim must be a fixed or readily ascertainable amount, not less than \$500. Third, the claim must be either not secured, or not adequately secured, by an interest in real property. Finally, the action must be based on a claim that is commercial in nature.

If these criteria are satisfied, a pre-judgment writ of attachment is generally available in commercial collection cases, including cases for breach of written lease agreements and breach of written unsecured loan agreements. One significant limitation to this remedy, however, is that an individual who is a guarantor of a commercial lease -- such as a principal of a closely-held entity which is actually the named tenant -- is subject to having his or her personal assets attached only upon a showing of sufficient personal involvement in the business.

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In order to obtain a pre-judgment writ of attachment, the plaintiff must establish that the claim in its complaint is of the sort for which a pre-judgment writ of attachment may be lawfully issued based on the four criteria above, and that the actual facts of the case will likely entitle the plaintiff to a final judgment in its favor on the underlying claim. If such showings are made, the court will then authorize the plaintiff to attach the defendant's property, including bank accounts and real estate, pending the final outcome of the litigation. The court will require the plaintiff to post a bond or a pledge of its property in an amount sufficient to compensate the defendant if it eventually turns out that the attachment was improperly granted.

There are several strategic benefits to seeking a pre-judgment writ of attachment. First, in order to properly oppose the writ application, the defendant must thoroughly address the merits of the plaintiff's claims, and the strengths and weaknesses of any defenses it purports to have. If the defendant's evaluation results in the defendant's realizing that the plaintiff has a good chance of prevailing on the merits, the defendant is more likely to make a reasonable settlement offer prior to the hearing on the application in an attempt to avoid the attachment.

Second, even if no settlement is reached prior to the hearing on the writ application, the defendant's opposition and the judge's ruling on the application often offer valuable insight into the defendant's strategy for defending against the plaintiff's underlying claim, and how the court perceives the merits of the case, including any strengths and weaknesses that may not have initially been obvious to the plaintiff and its counsel.

Finally, as mentioned above, if the plaintiff prevails and the court issues the writ of attachment, the plaintiff has substantially improved its chances of reaching a favorable settlement early in the litigation. This is because the judge who ruled on the application has already declared that the plaintiff will likely prevail on its claim, and because a portion of the defendant's assets will be unavailable to the defendant until after the case is finally adjudicated, which is now taking longer than in prior years due to budget cuts.

While there are many benefits associated with obtaining a writ of attachment, there are also some potential risks and disadvantages. In light of the current state of the economy, the issuance of a writ of attachment may push a defendant into filing bankruptcy. A defendant's doing so within 90 days after creation of the attachment terminates the attachment lien, and the plaintiff loses any potential benefits from having obtained the writ of attachment.

A second potential disadvantage is that the filing of an application for a writ of attachment may motivate certain defendants to oppose the merits of the underlying case, when they otherwise would have ignored the complaint and allowed a default judgment to be entered against them. Some defendants elect this strategy based on an assumption that the plaintiff will ultimately not be able to find assets against which to collect. The threat of a pre-judgment writ of attachment may alter this approach, resulting in the plaintiff's having to spend additional time and money to obtain a judgment that may have otherwise been obtained by default.

A third potential risk of obtaining a writ of attachment is that doing so may cause a plaintiff to lose its security interest in the defendant's real property under the so-called One Action Rule, or may arguably result in the inadvertent waiver of alternative non-contract tort claims which otherwise would remain valid. These are potential issues which the plaintiff's counsel would need to evaluate beforehand.

Finally, a plaintiff who files an application for a writ of attachment is subject to civil liability, including recovery on its attachment bond or undertaking, if it turns out that the attachment was improperly granted.

Attachment law in the state of California is complicated, and can present traps for the unwary. However, these problems should not deter a plaintiff from seeking a writ of attachment under the right circumstances in order to increase its chances of obtaining a fair settlement promptly and collecting on an eventual judgment.

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