

FINDERS KEEPERS, LOSERS WEEPERS

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This old proverb tells us that if something is abandoned, whoever finds it can keep it. This adage dates back to ancient Roman law, and has been applied to various circumstances throughout history. For example, in maritime law, for shipwrecks of a certain age, whoever finds the wreck can claim ownership if they file a proper claim. If you aren't into shipwrecks, perhaps you can relate to Elvis Presley's 1965 song, "Finders Keepers, Losers Weepers", where The King sings about finding the love of his life after someone else "lost" her. But what about finding personal property that your tenants "leave behind"? Can you just keep it? Well, just like shipwrecks and love, determining if something is unowned or abandoned often leads to legal or ethical disputes ... in other words, just because your tenant "has left the building", doesn't mean you can just keep their stuff!

Texas Property Code Section 93.002(d) states that "a tenant is presumed to have abandoned the premises if goods, equipment, or other property in an amount substantial enough to indicate a probable intent to abandon the premise, and is not within the tenant's normal course of business." The Texas legislature didn't do landlords any favors when they wrote that law because it is full of ambiguities; and one of the biggest hurdles for landlords to prove is the tenant's "intent" to abandon the premises. In a court of law, proving "intent" is never an easy task. Another provision of the Texas Property Code, Section 72.101, says that, under certain circumstances, personal property can be presumed abandoned if it is left on the premises for three years. However, the three (3) year waiting period makes this law impractical.

Aside from Section 72.101, Texas' law does not provide a clear-cut definition of "abandonment", and for several decades Texas courts have held that the mere passage of time and non-use of a premises does not constitute intent to abandon. The determination of "abandonment" is typically a factual one that a jury decides during a trial. Some landlords try to put language in their leases to define "abandonment", however, if not properly drafted, these definitions could be harmful. Other leases try to "back door" the issue – for example, some retail leases require the tenant to "continuously occupy" the premises, and that the tenant's business must be open during stated business hours. Other leases will place the tenant in default if they are not "conducting business" for a fixed period of time, such as 30 days. But even these provisions have a certain amount of ambiguity. For example, if a retail tenant goes on holiday for a month, they may be in default of the "continuous occupancy" requirement and thus liable to the landlord for damages, but their intentions to return after the holiday would not constitute abandonment.

Nevertheless, if you want to prove abandonment, you have to put your private investigator hat on and do some digging. It is helpful to take pictures of the space, and make a list of personal property left behind. Clever landlords will also look for tale tell signs of abandonment – for example, in this digital age, most office tenants are more likely to leave behind tables and chairs,

but remove their computer servers and other IT equipment if they have no intention of returning to the premises. Be sure to check the tenant's website for any new locations, and also check relevant social-media sites to see what your tenants are up to. Care should be taken during your investigation to maintain a record of your findings. It is a good idea to consult with counsel during this process to help preserve evidence and avoid pitfalls.

Assuming you can establish that the tenant abandoned the premises, how do you sell or dispose of all their abandoned property? The answer depends on a couple of factors. For example, if landlord has already commenced the eviction process, then the court may order the personal property to be kept in a separate, offsite warehouse, which may have to be insured or bonded. Once the property is stored, the tenant has up to thirty (30) days to claim the seized property. At that time, the tenant may have to pay storage fees to get their personal property back.

Regardless of whether or not an eviction is occurring, before disposing of tenant's personal property, a landlord must first understand and follow the applicable lien laws. The Texas Property Code gives all landlords a lien against the tenant's personal property in the premises in order to secure the tenant's payment of past-due rent (a "statutory lien"). The statutory lien has preference over tenant's non-secured creditors, but in most circumstances, the statutory lien is only good for up to six (6) months' worth of past-due rent, unless the landlord files a sworn statement with the county clerk. However, if there is any unpaid rent, the statutory lien forbids the tenant from removing any personal property from the premises. The statutory lien exists while the tenant occupies the building and until one month after the day that the tenant abandons the building.

In addition to the statutory lien, some leases also create a lien against tenant's personal property kept at the premises (a "contractual lien"). The contractual lien typically covers all past due rent, not just for six (6) months. However, landlords need to be careful because some tenants will try and add language in their leases to waive these lien rights. Additionally, tenant's lenders will typically ask the landlord to waive or subordinate the statutory lien and the contractual lien. Before agreeing to these concessions, the landlord should make sure they are satisfied with the tenant's overall creditworthiness.

Both the statutory and contractual liens attach to tenant's personal property in the space only if the tenant hasn't paid rent. Further, unless the lease has very good "self-help" language, in order for a landlord to exercise its rights under the statutory lien, it has to initiate a lawsuit and obtain what is called a "distress warrant", which allows the landlord to foreclose on the tenant's personal property. By comparison, most contractual liens allow for the landlord to sell the tenant's personal property without first initiating a lawsuit.

If the tenant has truly abandoned the premises and left behind property, and landlord has a valid lien against the personal property, then it can follow the required procedure for foreclosing on the lien and disposing of the property. But be careful because this legal process requires certain requirements to be satisfied, such as proper written notices to the tenant and any other junior

creditors. Additionally, a provision in the Texas Business & Commerce Code (known as the “UCC” or “Uniform Commercial Code”), provides some reasonable procedures for selling personal property, and most lawyers recommend that landlords follow these procedures. Landlords need to be careful when selling property because if it is conducted in an “unreasonable” manner, then the landlord can be exposed to lawsuits from the tenant, any guarantor, or any junior lienholders. Typically these lawsuits will accuse the landlord of not obtaining sufficient proceeds from the sale of the property because the landlord allegedly didn’t conduct a proper sale.

If there is no lien on the tenant’s personal property to foreclose upon, then you have to resort to the Texas Property Code for guidance on disposing the property. The Texas Property Code requires a landlord to deliver a notice by certified mail to the tenant’s last known address stating that after sixty (60) days, any abandoned property may be disposed of or sold. But aside from the notice requirement, the Property Code does not dictate the sales process, which can create a risky proposition for the landlord because, as discussed above, the landlord can be liable if the sale is not properly conducted. However, the UCC can be helpful because it provides guidelines for what is and is not a “commercially reasonable” sale; for example, the UCC has rules about the auction and bid process that should be followed.

Before the property can be sold (regardless of the method), the landlord needs to conduct a lien search to see if there are any junior liens on the property, or any so-called “purchase-money liens”. Additionally, some personal property left in the premises might belong to third parties (i.e. goods on consignment, leased equipment, pre-paid inventory, etc.). A Landlord is not authorized to sell personal property belonging to third parties, and a landlord has a duty to investigate the ownership of the personal property.

Once the abandoned property is sold, the landlord needs to determine what to do with the proceeds. It is rare that the value of the sold property will cover all the past-due rent and other charges owed by the tenant, but if the sales proceeds exceed such amounts, the landlord cannot just pocket the excess. Further, landlord should know to whom he/she should distribute the sales proceeds to. For example, if there are junior lienholders, the UCC requires the excess sales proceeds to first be distributed to the creditors and then to the tenant. But landlords need to be aware of other creditors’ rights because if the landlord does not conduct a proper sale, or if the landlord does not provide the excess sales proceeds (if any) to the other creditors, then the landlord can be liable for damages.

In conclusion, before disposing a tenant’s personal property, all landlords need to look before they leap. If the tenant has not actually abandoned the premises, or if you sell property that is subject to any third-parties’ rights, then you can be liable for damages. But if the coast is clear, you can dispose of the property properly and keep all the proceeds that you are legally entitled to keep. Or, as Elvis puts it: “I’m not the kind to play for fun ... I only play for keeps and I’m keeping all the love I won.”