



LEGAL NOTES

FROM THE DESK OF HAROLD CHU

When a title holder dies, marries, divorces or if a mortgage is given, the appropriate documentation must be filed, especially for Land Court property. If title is held as tenants in common, there must be a probate proceeding to clarify the title. If this is not done, it will be almost impossible to sell the property.



A mortgage is a piece of paper that secures no right to the proceeds from any sale unless that mortgage is recorded. If a party uses a mortgage to provide security for payment, it is imperative that they record the mortgage.



Many people who registered on the Do Not Call Registry found that their registration expired this year. Re-registration is a simple process and the time spent in re-registering is less than the time one would spend on one unsolicited phone call. The registry also allows for the inclusion of cell phone numbers.



We have included in this newsletter some miscellaneous suggestions for our clients. These are tips to our landlord clients, to those buying a condominium, and to those seeking financing to purchase real property.



We are entering our 33rd year of practice. We appreciate and thank you for your business and support. On behalf of our entire office, we wish you much joy and happiness this holiday season and a very prosperous and healthy 2008!

More Tips for Landlords

We have, in prior newsletters, provided tips for our landlord clients. Some of those prior articles are included in this newsletter.

The following are some additional suggestions that we have for landlords in addition to the re-published articles:

1. Delay makes it more likely you will sustain losses.

Landlords are generally nice people. Unfortunately, tenants take advantage of that kindness. We have had several incidents in which landlords have come to us to evict tenants, who are years behind in their rent payments. The odds of collecting from a non-paying tenant is already not good. For a tenant who has not paid rent for a long period of time, it is unlikely the landlord will ever collect the amount that is owed.

2. Get it in writing.

It is extremely important for the landlord to get the rental agreement in writing. If the rental agreement is not in writing, the landlord and tenant could and will likely disagree as to the terms and conditions of the rental arrangement. This may make it more difficult, but not necessarily impossible to assert the landlord's rights.

3. Make the necessary disclosures.

Landlords are required to provide by law to make certain disclosures to tenants. These disclosures include:

a) Providing a copy of the rental agreement to the tenant if the

rental agreement is in writing.

b) Landlords must issue receipts for all rents paid. Cancelled checks may be considered as receipts, but the tenant may request a landlord's written receipt in addition to the cancelled check.

c) The landlord must disclose in writing the name and address of the owner or the owner's agent authorized to receive rents or notices in the mail. That person must reside on the same island as the property is located. This information must be kept current at all times.

d) The landlord must also provide his/her general excise tax number to all tenants for purposes of filing, if applicable, for a low income tax credit.



TIPS FOR LANDLORDS (PART II)

"KEEPING THE SECURITY DEPOSIT"

We occasionally encounter the situation where a landlord has a tenant who caused damage or did not pay the rent, but the Landlord is required by law to return the security deposit to the defaulting tenant. The landlord could have avoided this. Hawaii law permits the landlord to retain some or all of the security deposit if the landlord complies with state law.

(See *MORE TIPS*, Page 2)

MORE TIPS

From Page 1

Hawaii Revised Statutes § 521-44(c) provides as follows:

"At the termination of a rental agreement in which the landlord required and received a security deposit if the landlord proposes to retain any amount of the security deposit for any of the purposes specified in subsection (a), the landlord **shall** so notify the tenant, in writing, unless the tenant had wrongfully quit the dwelling unit, together with the particulars of and grounds for the retention, including written evidence of the costs of remedying tenant defaults, such as estimates or invoices for materials and services or of the costs of cleaning, such as receipts for supplies and equipment or charges for cleaning services...."

In plain language, this means if the landlord has any reasons for keeping all or any part of the security deposit, the landlord must: 1) provide written notice to the tenant **within** fourteen (14) days after the lease is terminated, 2) explain in writing the

reasons for the retention of any monies, and 3) provide receipts or estimate of repair for the amount being retained. If the landlord doesn't do this, the landlord **must** return the security deposit and face the prospect of suing the tenant for the amount in a separate action. The landlord will then have to consider the practicality of the costs for such a legal effort against the amount of the loss caused by the tenant.



TIPS FOR LANDLORDS (PART III)

WHY CAN'T I JUST LOCK THE BUGGAH OUT?

We are occasionally asked by landlords whether they can simply lock the tenant out if the tenant has not paid its rent. This is permitted in other states. This question is often asked after we have explained the court procedures required under Hawaii law to regain possession of the property. These procedures often test the patience of landlords and

add to their frustrations. **Our answer is always "No".**

Under Hawaii law, if the landlord locks out the tenant, the landlord does so at its own risk. The landlord may be required to pay the tenant two months of rent **and** the tenant's attorney's fees **and** court costs **and** possibly other damages.

Hawaii Revised Statutes § 521-63(c) provides as follows:

"If the landlord removes or excludes the tenant from the premises overnight without cause or **without court order so authorizing**, the tenant may recover possession or terminate the rental agreement **and**, in either case, recover an amount equal to two months rent or free occupancy for two months, **and** the cost of suit including reasonable attorney's fees.... The court may also order any injunctive or other relief it deems proper."

An appellate court has upheld the court's authority to award the tenant these amounts in *Kaiama v. Aguilar*, 67 Haw 549.

Patience is not only a virtue, but it can also be considerably cheaper in the long run.

When the Status of the Title Holder Changes

The State of Hawaii does not automatically modify the ownership of your property when there is a death of a title holder, the title holder gets divorced, or marries. For example, when a title owner passes away, you must do something to give notice of that title owner's death. The heirs must take the necessary steps to assure that there is a recorded notice of that death.

For Land Court properties, a petition to note the death or marriage along with the certified supporting documents must be filed. The petition is a legal document and it should be prepared by an attorney so that the proper recording requirements are met.

If the property is a regular system

property, an affidavit to note the death is recorded. Although this is simpler than a land court petition to note the death, it is still our recommendation that an attorney be retained to prepare the affidavit.

If the property was held as joint tenants, the filing of the appropriate notice of death will modify the title as a matter of law. If title to the property was held as tenants in common, then it will be necessary to do a probate to formally address the issue of the appropriate heirs and the title to the property.

We suggest that there not be undue delay in addressing changes to the title because the passage of time can make the task more difficult and expensive.



NOTICE

During December and January, our offices will be closed on the following dates:

- ▶ Monday, December 24, 2007
(closed all day)
- ▶ Tuesday, December 25, 2007
(closed all day)
- ▶ Monday, December 31, 2007
(closed all day)
- ▶ Tuesday, January 1, 2008
(closed all day)



Miscellaneous Suggestions

A Suggestion for Landlords

The landlord should make a visual record of the property **before** the tenant takes occupancy. Some landlords video tape the premises' condition. It is important to also have the tenant acknowledge the condition of the property **before** the tenant takes occupancy.



A Suggestion for Condo Buyers

If you are buying a condominium, we strongly encourage you to review the condominium documents that are provided to you as part of the purchase. Look at the House Rules to see whether they would affect you. Review the condominium's finances and the association's reserves to assess the financial situation of the condominium and whether there is a sufficient reserve or if a special assessment is likely for major expenses.

A Suggestion for First Time Buyers

When looking for property to buy, you should consider what is available in your price range. Go to a lender and pre-qualify to determine the amount you can borrow. Add this amount to your available funds. This would determine the price range within which you should be shopping.

Registration on the Do Not Call Registry

The Do Not Call Registry now contains 145 million phone numbers. I personally experienced a noticeable decline in unsolicited calls after I placed my phone number on this registry. The registration was good for a period of 5 years and for most people it is necessary to re-register.

There is an effort by the legislators to not require people to re-register. While that legislation is pending, your telephone number will not be dropped from the National Do Not Call Registry. You can wait for legislators to take action, but re-registering is a fairly simple process. When I re-registered recently, it took less than 5 minutes. You will then need to confirm your registration by opening an e-mail sent to you. Re-registering is well worth the time spent to minimize unsolicited phone calls. It took less time to re-register than one would spend with just one unsolicited phone call.



Add Your Cell Phone Number to the Do Not Call Registry

You can also register your cell phone number on the National Do Not Call Registry. You should call the following number from your cell phone: 888-382-1222 or register on line at WWW.DONOTCALL.GOV.

Record that Mortgage

It is important that you remember to record any mortgage that was given to secure a loan. A mortgage document that is given, but not recorded does not legally affect the property. The purpose of recording the mortgage is to provide security that the obligation is paid if the property is sold, refinanced, or transferred.

State law provides that for Land Court property, any documents that purports to affect the property must be recorded. This is required by Hawaii Revised Statutes § 501-116 which provides:

"The mortgage, and all instruments assigning, extending, discharging, and otherwise dealing with the mortgage, shall be registered and **shall take effect upon the title of the mortgaged property only from the time of registration.**"

The mortgage is recorded to give constructive notice that there is a claim against the property. Constructive notice is notice to the world of the claim.

Deed in Lieu of Foreclosure and Phantom Income

In addition to the heartache of losing one's property by deeding the property back to the lender in lieu of a foreclosure, a party needs to be concerned about the possibility of "phantom" income. Under present law, when one gives property back to the lender, the debt owed on the mortgage that is forgiven is considered income to you and taxes must be paid on that income.

There is presently legislation being considered to eliminate this phantom income. At the time of this newsletter, the law has not been changed. People who are considering a deed in lieu of foreclosure need to be aware of the tax implication on the mortgage debt that they did not pay.

