

Fear Not—All May Not Be Lost (Or Removed) If The Landlord Can Obtain A *Distress Writ*

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In addition to an action for eviction and money damages that a commercial landlord may initiate when a tenant fails to pay rent, a landlord may additionally seek a *distress writ* from a court to secure its interest by enjoining the tenant from removing or destroying any of the tenant's valuable property in the premises. The proceeding is *ex parte* in nature and commenced by filing a verified distress for rent complaint and a distress bond.

Once the Landlord makes the decision to evict,² but before it initiates an action for eviction or damages, it should consider whether there is any equipment or goods on the premises that may be valuable and/or useful for attracting a new tenant.³ Frequently landlords spend significant sums in tenant improvement allowances to provide a means for a tenant to purchase equipment for the tenant's operation. For example, a sports bar may spend significant tenant improvement allowances for purchasing refrigeration units, shelving, security systems, and expensive televisions. If the landlord simply filed an eviction action without a court order specifically requiring the tenant to leave all equipment in the premises, the tenant might try to move out in the middle of the night with the equipment. While there is a landlord's lien pursuant to Section 83.08, Florida Statutes, which provides for civil and criminal penalties when a tenant intentionally removes property from the premises, from a practical standpoint, a court order stating that the tenant cannot remove the property from the premises is a far more powerful tool.⁴ Were the tenant or its employees to violate a court order, they could be held in contempt of court.

Specifically, Section 83.12, Florida Statutes (2016) and the relevant case law provide for a distress writ when the following conditions are met: (1) the writ shall not issue without judicial authorization; (2) the writ may issue only upon allegations of specific facts; (3) the party seeking to invoke a writ is required to post a bond to guarantee the tenant's interests in the event the writ was later determined to be improperly issued; (4) the tenant has the opportunity to obtain an immediate hearing to dissolve a writ; and (5) there is the opportunity for a prompt hearing on the merits, though not necessarily a pre-deprivation hearing.⁵

An *ex-parte* verified complaint for a distress writ typically should be filed in the circuit court (provided the value of the equipment exceeds \$15,000), and the landlord must post a bond for either twice⁶ the amount owed or double the amount of the estimated value of the property in order to obtain the writ, whichever is greater.^{7, 8} Because a distress writ, at its core, is essentially a prejudgment writ, to understand its limits, it is important to look back at how the statute evolved into its current form.

Sections 83.11 and 83.12, Florida Statutes (2016), govern the process for a plaintiff seeking to obtain a distress writ against a defendant; however, the statutory language has been amended over time. Section 83.12 evolved from a statute with minimum requirements and procedural safeguards into its current version after the Florida Supreme Court determined in *Phillips v. Guin & Hunt, Inc.* that Sections 83.11 and 83.12 were unconstitutional.⁹ The *Phillips* court heavily examined the United States Supreme Court's treatment of prejudgment statutes and reiterated the balancing test required to determine a prejudgment statute's constitutionality. The court in *Phillips* pointed out that early courts frequently upheld the interests of creditors by upholding prejudgment statutes; however, once the American economy grew more dependent on credit, courts began to reevaluate the rights and duties of interested parties.

The *Phillips* Court held a proper balancing occurs when: (1) a judge is satisfied that the writ should issue; (2) the party seeking to invoke state action posts a bond to guarantee the interests of the creditor; and (3) there is a full hearing as to the right of possession without undue delay, which does not need to occur before the actual deprivation of property.¹⁰ Ultimately, the *Phillips* Court found the aforementioned statutes unconstitutional on their face because: (1) they did not provide the right to a hearing promptly after the issuance of the writ or even before the property is levied upon; and (2) they did not require that either a judicial officer or a clerk to make an independent factual determination that the statute has been complied with to issue the writ.¹¹

The *Phillips* Court also established the proper interpretation of the statute governing service of process required for distress writs. The Court held that Section 83.13, Florida Statutes (1977) allowing for service of process by posting notice of the writ "if the defendant cannot be found," was constitutional, but was applied unconstitutionally by the county court.¹² The *Phillips* Court determined that the statute should have been interpreted so that the provision stating "if defendant can be found" includes the entire state of Florida and not just the county in which the property is located.¹³ Therefore, the *Phillips* Court determined that Section 83.13 was constitutional provided the search for the defendant before posting notice of the writ included the entire state of Florida.¹⁴

In response to the Court in *Phillips*, which found Sections 83.11 and 83.12 to be unconstitutional, the Florida Legislature amended Sections 83.11 and 83.12, and added Section 83.135, Florida Statutes in 1980. Section 83.11 was amended to require that the complaint be verified and that it allege the name and relationship of the defendant to the plaintiff and how the

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obligation arose.¹⁵ Section 83.12 was amended to require that the distress writ be issued by a judge as opposed to a clerk of court, and Section 83.135 was added to provide tenants with the right to move for a dissolution of the writ at any time.¹⁶

A commercial tenant challenged the statute's constitutionality in 1992 in *Goodman v. Brasserie La Capannina*.¹⁷ In *Goodman*, the landlord complied with the statute's requirements by filing a two-count verified complaint against the tenant, who operated a restaurant on the premises, for breaching its lease by failing to timely pay rent and other charges due.¹⁸ The trial court held an *ex parte* hearing and issued the distress writ so the sheriff could serve the writ on the tenant. Since the tenant operated a restaurant on the premises, it filed a motion to modify the writ to exclude food and alcohol in order to keep the restaurant operating. Two days later, although the trial court held an emergency hearing at which the tenant's motion to modify the distress writ was denied and bond was set for the tenant to pay to repossess the distrained property, the tenant was unable to pay the bond and the distress writ remained in effect. A month later, the trial court denied the tenant's motion to dissolve the distress writ and rejected its arguments that the statute was unconstitutional. The tenant appealed the trial court's decision and the Fourth District Court of Appeal found Section 83.12 unconstitutional on its face as violative of due process requirements because it failed to provide the presiding judge with the discretion required by *Phillips* for an impartial factual determination about whether or not to issue the distress writ.¹⁹

The Florida Supreme Court reversed the Fourth District Court of Appeal and interpreted the language of Section 83.12, Florida Statutes (1992) to mean the judge's required factual determination consists of: (1) determining whether a verified complaint meets the requirements of the statute; and (2) determining whether it alleges a *prima facie* case. Furthermore, the *Goodman* Court construed Section 83.12's language stating that "a distress writ shall be issued by a judge" as merely identifying the individual with the authority to issue a distress writ and not restricting the judge's discretion to make the required determination.²⁰

The Florida Supreme Court in *Goodman* recognized that Section 83.12 was constitutional because it granted a judge the authority to make the required impartial factual determination that the complaint was verified, it met the requirements of Section 83.11 and it alleged a *prima facie* case for obtaining a distress writ. The *Phillips* Court effectively articulated the purpose of the distress writ as a preliminary procedure designed to stop a tenant from acting in bad faith by destroying or alienating the property and, thus, harming the landlord's interest. Providing notice and opportunity to be heard before issuing a distress writ could destroy its very purpose since both would effectively warn the tenant of the landlord's intention to place a lien on its property and give the

tenant time to act in bad faith.²¹

In *Goodman*, the Court noted that the "issuance of that writ may substantially deprive the tenant of its property interest, even though the sheriff has yet to levy on the property."²² Therefore, the *Goodman* Court created an exception to its holding by requiring an adversarial hearing on a tenant's motion to dissolve a distress writ in cases where the writ effectively deprives an entity of its ability to operate its business. Because the writ in these cases constitutes an "immediate and substantial deprivation of property," the adversarial hearing must be held as soon as reasonably possible so the court may consider all relevant matters put forth by the tenant in a motion to modify or dissolve the writ. Furthermore, the landlord will have the burden of proving probable cause that the writ is justified at such hearing.²³

Accordingly, while a prejudgment distress writ can be a powerful means of ensuring that valuable fixtures, goods and equipment are not removed from the premises and can provide the landlord with significant leverage in a dispute, the courts have found the statute to be constitutional only if the landlord adheres to the specific statutory procedures and requirements. ■



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Endnotes

- 1 Joleen East, a rising 3L at University of Florida Law School, assisted with the research and drafting of this article.
- 2 Summary Procedure is governed by Fla. Stat. § 51.011 (2016).
- 3 Fla. Stat. § 51.011 (2016).
- 4 See Fla. Stat. § 83.08 (2016).
- 5 See *Phillips v. Guin & Hunt, Inc.*, 344 So. 2d 568, 571-72 (Fla. 1977).
- 6 See Fla. Stat. §83.12 (2016) and *Goodman v. Brasserie La Capannina, Inc.*, 602 So.2d 1245 (Fla. 1992). Before issuing a distress writ, the court must determine whether the verified complaint meets the statutory requirements and whether it alleges a *prima facie* case that the tenant may damage or dispose of property or remove property.
- 7 Fla. Stat. § 83.12 (2016).
- 8 See *Phillips*, 344 So.2d at 570 (stating that landlord posted a bond for twice the value of the property sought to be levied upon as required to balance the interests of the parties).
- 9 *Phillips*, 344 So.2d 568.
- 10 *Id.*
- 11 *Id.*
- 12 *Id.* at 573.
- 13 *Id.*
- 14 *Id.*
- 15 Section 83.11 (1980), Section 83.12 (1980), Section 83.15 (1980).
- 16 *Id.*
- 17 *Goodman*, 602 So.2d 1245 (Fla. 1992).
- 18 *Id.* at 1246.
- 19 *Id.*
- 20 *Id.* at 1248.
- 21 *Id.* at 1247.
- 22 *Id.* at 1248.
- 23 *Id.*