

PROPERTY MANAGEMENT

Quarterly

Law

Fiduciary duty and liability for property managers

Property owners frequently delegate authority for financial matters involving their properties to property managers, including the collection of rent or deposits and the costs of repairs or maintenance. What duties does the property manager owe to the property owner by assuming responsibility for these financial matters? In addition to any duties imposed by the contract, the property manager may owe a “fiduciary duty” to the property owner, depending on the level of control exercised by the property manager over these financial matters. A fiduciary duty imposes strict legal requirements on the property manager and subjects the property manager to increased exposure to liability, if breached.

Generally speaking, a fiduciary relationship exists when one person is entrusted to act for the benefit of or in the interests of another. The term “fiduciary duty” actually includes two distinct duties: the duty of care and the duty of loyalty. Essentially, one who possesses a fiduciary duty must act in



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the best interests of his or her principal. In the property management context, this means that the property manager is responsible for ensuring that all rent payments are promptly paid to the owner, contracting with reliable and affordable companies for repairs and maintenance, avoid-

ing the commingling of property funds with personal funds, and otherwise avoiding spending property funds in ways that will not benefit the owner.

Fiduciary relationships may arise from a voluntary undertaking or by statute. In certain types of relationships (such as trustee-beneficiary or officer-shareholder relationships), the law presumes the existence of a fiduciary duty. In other instances, the duty arises simply because one party exercises superiority and influence

over the other and agrees to act in the other party’s best interest, which comes with a general expectation of trust, confidence and reliance.

A property owner may assume a fiduciary duty to the owner by including express language to that effect in the contract. In



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addition, a fiduciary duty may be imputed by law under certain circumstances, even where the contract is silent as to the existence of any fiduciary duties. In *Newcastle Props. v. Kinnickinnic Realty Co.*, No. 2015CV32005, 2017 Colo. Dist. LEXIS 1106, at *9-10 (Colo. Dist. Ct. May

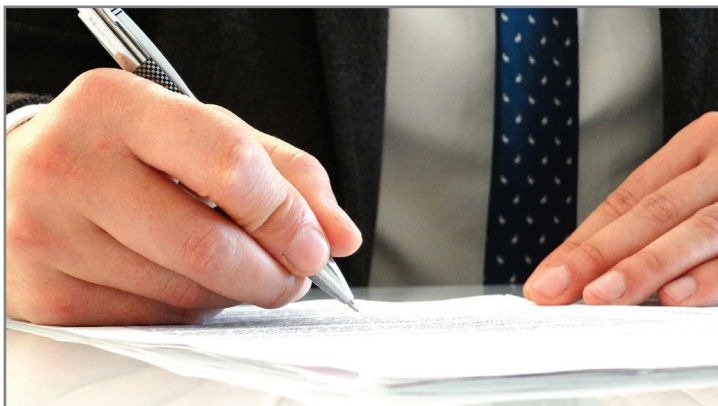
11, 2017), for example, a court in Colorado imposed a fiduciary duty on the property manager where: the property owner was not an expert in real estate and lives in a different state from their property, the owner heavily relied on the property manager to manage its property, and the property manager had discretion to collect all rent and security deposits on the owner’s behalf. Under those circumstances, the law imposes a fiduciary duty on the property manager to keep the money it collects in trust, to spend that money on maintenance and upkeep of the properties, to fairly compensate itself out of the owner’s funds and to otherwise exercise a high degree of control over the owner’s assets.

If a property manager does owe a fiduciary duty to the property owner (whether expressly agreed to in a contract or imputed by law based upon the circumstances), and the property manager breaches that duty, then the property manager may be held liable for economic or even punitive damages to the property owner. These damages can include the value of anything the

property manager received as a result of the breach; the loss of any of the owner’s property or assets caused by the breach; the profits that the property owner lost as a result of the breach; and any damages the owner sustains as a result of third-party claims (such as claims by contractors or vendors) arising out of the breach. The property manager also may be held liable for punitive damages where the breach is accompanied by wanton and reckless conduct, such as when the property manager entirely disregards the rights and feelings of the property owner.

In summary, whether a fiduciary duty exists depends upon the language of the property management contract and the relationship between the property manager and owner. The likelihood of such a duty being imposed increases as the owner delegates more control over financial matters to the property manager. To mitigate the risk of a fiduciary duty being imputed by law, property managers may include language in their contracts expressly disclaiming any fiduciary duties or responsibilities. However, a disclaimer may not always prevent a fiduciary duty from being imposed by law, such as if the property manager is providing services under the circumstances described in subparts (i) through (iii) from the *Newcastle Props* case above. Therefore, the best practice for avoiding liability from fiduciary duties is for property managers to consistently handle the receipt and expenditure of property-related funds in a manner that is in the best interest of the property owner. ▲

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